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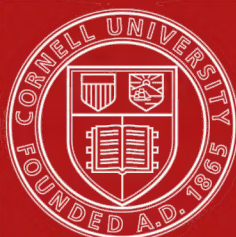
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# PRIZE CASES

HEARD AND DECIDED IN THE PRIZE COURT  
DURING THE GREAT WAR

BY

The Right Hon. Sir SAMUEL EVANS, LL.D.,

*President of the Probate, Divorce, and Admiralty Division,*

AND

IN THE COURTS OF THE  
OVERSEAS DOMINIONS

AND ON APPEAL TO THE

JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL.

UNDER THE GENERAL EDITORSHIP OF

E. C. M. TREHERN, LL.M.,

*Of the Middle Temple, Barrister-at-Law.*

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## INTRODUCTION.

IN this volume of Prize Cases it is believed that the practitioner will find all the decisions of permanent interest on the law and practice of Prize decided since the outbreak of the war in August, 1914, down to the end of 1915.

The first Prize Court in England since the time of the Crimean War sat on September 4, 1914, under the Presidency of the Right Honourable Sir Samuel Evans, P.C., LL.D., President of the Probate, Divorce, and Admiralty Division, and there have been ninety-seven subsequent sittings. Many new points have arisen for decision, and ancient principles have been adapted to modern requirements; and in upholding the traditions of its predecessors the Court has had regard to "the circumstances arising out of the particular situation of the war and of the condition of the parties engaged in it."

A notable example of this is the case of *THE KIM* (and other Scandinavian vessels)—probably the most important case ever decided in a Prize Court—in which the learned President applied the doctrine of continuous voyage to conditional contraband and condemned large quantities of foodstuffs shipped from the United States in neutral vessels and ostensibly consigned to a neutral port. That the Prize Court

is not to be unduly fettered by precedent is shewn by the President's decision in *THE MÖWE*, in which he laid down that the alien enemy should be allowed to appear in the Prize Court in any case in which protection, privilege, or relief was claimed under a convention such as The Hague Convention; "although," said his Lordship, applying the principles laid down by Lord Stowell and Dr. Lushington, he was "satisfied that in their day they would not have allowed the enemy owner to appear to assert such a claim." In *THE ROUMANIAN* the vexed question was raised as to the seizure of enemy property on land, and the Court held that a cargo of oil belonging to an enemy, brought in a British ship into a British port and pumped for safe custody into tanks on shore, could be lawfully seized as prize in the tanks. This decision has been upheld by the Judicial Committee of the Privy Council, as has the decision that holders of bills of lading, as pledgees, have no claim which the Prize Court will recognise (*THE ODESSA*).

Forty-seven decisions of the President are reported, and nineteen of H.B.M. Prize Court for Egypt. In *THE GUTENFELS*, now under appeal, the latter tribunal had to deal with complicated questions of international law arising out of the peculiar *status* of the Suez Canal under the Convention of 1888 and the anomalous position of Egypt before December 18, 1914, when, according to British law, the Suzerainty of Turkey terminated and Egypt was constituted a British Protectorate. The Court held that Ports Said

and Suez were to be regarded as ordinary Egyptian ports when not used as ports of the Canal, and that enemy vessels remaining in them for refuge were not protected from capture.

Cases are also reported from various Colonial Courts sitting in Prize in which interesting points have arisen, particularly with regard to the doctrine of unneutral service, a matter which up to the present has not directly come before the Prize Court in London. C. B. L. Tennyson, Esq., C.M.G., Legal Assistant to the Colonial Office, with great courtesy has placed all the judgments sent to the Colonial Office at the disposal of the Editor, who wishes to take this opportunity of expressing his thanks.

A headnote has been written to every case, and full reference to authorities will be found in the Table of Cases Cited.

Volume II. will be published, as before, in separate parts in order that the reports may be kept up to date.

E. C. T.

4 KING'S BENCH WALK, TEMPLE:

*January, 1916.*





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## CORRIGENDA.

Page 111, line 17, *delete* "if."

" 160, " 8, *for* 2 Eng. P.C. 484, *read* 2 Eng. P.C. 48.

" 258, " 33, *for* 1 Dods. 183, *read* 1 Dods. 353.



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# REPORTS OF PRIZE CASES

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[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). Sept. 4, 1914.

## THE CHILE.

*Prize Court—Enemy's Merchant Ship in British Port—Commencement of Hostilities—Order in Council—Days of Grace—Less Favourable Treatment by Enemy—Detention—Second Hague Peace Conference, 1907, Convention IV. art. 23 (h), Convention VI. arts. 1, 2—Prize Court Practice—Enemy Ship-owner—Resident in Enemy Country—Affidavit as to Appearance—Insufficiency—Dock Owners—Liberty to Apply.*

A German merchant steamship was lying in a British port when war was declared to exist between Great Britain and Germany, and was seized on behalf of the Crown by the Collector of Customs of the port as a *droit of Admiralty*. Article 1 of Convention VI. of the Second Hague Peace Conference, 1907, provided that when a belligerent merchant ship was at the commencement of hostilities in an enemy port, it was desirable that it should be allowed to depart freely, either immediately or after a reasonable number of days of grace; and article 2 provided that a merchant ship, which was not allowed to leave, might not be confiscated, but the belligerent might merely detain it on condition of restoring it after the war. By Order in Council, dated August 4, 1914, it was ordered that enemy merchant ships, which at the outbreak of hostilities were in any British port, should be allowed till August 14 for departing from such port, if information was obtained that the treatment of British merchant ships in an enemy port was not less favourable. This information was not obtained by the British Government, so that effect could not be given to article 1 of Convention VI.

*The Court was asked on behalf of the Procurator-General for an order for the detention of the ship:—Held, that an order should be made that the ship belonged at the time of seizure to enemies of the Crown, and had been properly seized by the officers of the Crown, and was to be detained by the Marshal till further order.*

*The writ in this cause was in the prescribed form, and had been issued by the Procurator-General, and was duly advertised. It was addressed to the owners and parties interested in the ship, and commanded them to cause an appearance to be entered for them. Counsel for the German owners, resident in Germany, contended that they were entitled to appear, but the affidavit as to appearance, which was made by a member of a London firm described as agents of the owners, did not state who were the owners of the vessel, or any special circumstances entitling them to appear:—Held, that the affidavit was wholly insufficient to entitle the enemy owners to appear.*

*Dock owners, to whom considerable sums had accrued, and were accruing, in respect of the ship, were given liberty to apply to the Court.*

Claim for detention of an enemy vessel seized in port.

The German barque *Chile* (Danker, master), 2,182 tons gross, of the port of Bremen, arrived in the East Bute Dock, Cardiff, with no cargo on board on August 4, 1914. A state of war was declared to exist between Great Britain and Germany as from 11 P.M. on August 4. On August 5 the *Chile* was seized by the Collector of Customs at Cardiff, and a writ in the prescribed form against the owners and parties interested in the vessel was issued on behalf of H.M. Procurator-General for her condemnation, and was duly advertised.

*The Attorney-General (Sir John Simon, K.C.), Aspinall, K.C., and Ricketts, for the Procurator-General.*

*The Attorney-General (Sir John Simon, K.C.) said this was the first case which had come to be tried in a British Prize Court for sixty years, and he might perhaps be allowed to make a few general observations in view of the novelty of the procedure so far as those at present practising at the Bar were concerned, and also in view of the interesting character of the occasion. He thought he was right in saying that the old High Court of Admiralty was from very ancient times a Prize Court, and*

indeed it had two jurisdictions, which used to be called the "Instance" Jurisdiction and Prize Jurisdiction. The Instance Jurisdiction corresponded to that which was now administered by His Lordship and other Judges in the Admiralty Division of the High Court of Justice in ordinary times, and dealt with cases of collision and salvage.

The Prize Jurisdiction attached to the old Court of Admiralty from very ancient times, and its origin was wrapped in obscurity, but it was certain that it was the High Court of Admiralty, in the event of prizes being taken, which exercised a jurisdiction corresponding to that which His Lordship was undertaking. When the High Court of Admiralty had become merged in the High Court of Justice, the Supreme Court of Judicature Act, 1891 (54 & 55 Vict. c. 53), s. 4, sub-s. 1, provided: "The High Court in England shall be a prize court within the meaning of the Naval Prize Act, 1864 [27 & 28 Vict. c. 25], and shall have all such jurisdiction on the high seas, and throughout Her Majesty's dominions, and in every place where Her Majesty has jurisdiction, as under the Naval Prize Act, 1864, or otherwise the High Court of Admiralty possessed when acting as a prize court." Sub-section 2: "Subject to rules of court, all causes and matters within the jurisdiction of the High Court under this Act as a prize court shall be assigned to the Probate, Divorce, and Admiralty Division of the Court." Consequently, in principle, the jurisdiction now about to be exercised was the same jurisdiction as was exercised from time immemorial by the old High Court of Admiralty.

The long interval of time which had elapsed since a Prize Court sat had necessarily involved great changes. There were obviously very great changes in the conditions which would have to be considered, and in the difficulties which would have to be solved by His Lordship. The almost universal substitution of other means of motion on the sea for the use of sails was a very small part of the whole of the changed conditions. When Dr. Lushington sat during the time of the Crimean War, and still more when Lord Stowell sat during the Napoleonic Wars, it could not have been contemplated that a time would come when it would be possible to communicate with a ship on the high seas by means of the marvellous development of science which was now regarded almost as a matter of course. Another change was that the office of King's Advocate had disappeared.

He understood that it was essential in a prize case that the claim for the condemnation of a prize should be a claim that it should be condemned to the Crown. It seemed to be popularly supposed that when a prize had been captured, the prize, if condemned, belonged to the captors. He did not think that that was an accurate way of stating what took place. It was true that under the old practice the captors applied for a condemnation of the ship, but if a decree of condemnation was made it decreed a good and lawful prize to the Crown, and it was by a subsequent act of the Royal judgment and discretion that the proceeds of the prize might be distributed among those immediately responsible for its capture. It had already been announced that in the present war some modification of that principle was intended to be introduced. Under modern conditions it would be wrong that only those particular members of the sea forces who took part in the capture of an enemy ship should be the persons to be considered, if the Crown in its judgment thought right to distribute the proceeds of the prize. Some of the most important and gallant services in the Navy were performed by men who never in any circumstances could have anything to do with the capture of prizes. The submarine service, on the one hand, and those serving upon a Dreadnought, on the other, would in the ordinary course have no part in the taking of prizes. The rule formerly prevailing would therefore be modified, but the principle, that if a prize were taken and condemned it would be condemned to the Crown, was the old principle which would be carried out during the present war.

It was correct to say that an English Judge who administered the law in a British Prize Court administered "the course of Admiralty and the law of nations." That was the old form of commission to the Court. Looking back at the early reports those words were to be found, and there could be no question that the jurisdiction, which His Lordship was exercising, was essentially the same, both with regard to its nature and its ambit, as was exercised by the famous predecessors of His Lordship who had sat in a Prize Court. Particulars as regards those predecessors were very conveniently tabulated in *English Prize Cases*, vol. i. p. x.

"Although the law administered by the Court was 'the course of Admiralty and the law of nations,' it was none the less true to say that the Prize Court was administering the law of England,



and we were entitled to make the proud claim that after all it was the administration of the law of the British Prize Courts which had sat in this country in the past which had built up a great code of law and had laid down for ourselves, and for a large part of the civilized world, the principles to be extracted from 'the course of Admiralty and the law of nations.'"

The second branch of this law which would be applied in this Court was what had been called "the common law of nations." This depended on the teaching and learning of the civilians and other great authorities, and on special treaties or international arrangements entered into by the Great Powers of the world.

One of the most famous of such international agreements was that contained in the Declaration of Paris, 1856, which was entered into immediately after the Crimean War. He believed that the British Prize Court had never had to apply the Declaration of Paris in a prize case, but pursuant to that arrangement a neutral flag would be a protection for enemy cargo so long as that cargo was otherwise not open to challenge on the ground of a breach of the law as to contraband or the law of blockade. He was reminded by his learned friend Dr. Holland that, although the Declaration of Paris was entered into after the Crimean War, by consent, this country acted on its principles during the war. Since that time the most important additions to the law of nations were those which arose from a series of Conventions entered into by the Second Peace Conference at The Hague in 1907, by which the civilised world made efforts to modify the code applicable in war time. He apprehended that these Conventions, in so far as they had been agreed to by the contracting parties, would be regarded by His Lordship as grafted upon the law of nations.

*The Attorney-General (Sir John Simon, K.C.),* then turned to the facts of this case, and referred to the affidavit setting out the facts relating to the seizure of the *Chile*, as stated above. With regard to the jurisdiction of the Prize Court to deal with a vessel which had arrived in a British port before war existed, he contended that a Prize Court had now and had always had jurisdiction to deal with enemy vessels, whether they were captured on the high seas, or whether they were seized in a port or harbour other than a neutral one, as soon as the authorities of this country had seized them.

In *LINDO v. RODNEY* [1782] (2 Dougl. 612*n.*, 614*a*) Lord Mansfield said that upon the declaration of war all the ships of the enemy are detained in our ports, to be confiscated as the property of the enemy, if no reciprocal agreement is made. An attempt was made at the Second Peace Conference held at The Hague in 1907 to make a reciprocal arrangement dealing with the case. Convention VI., to which the Empire of Germany and the Crown of Britain were parties, related to the *status* of enemy merchant ships at the outbreak of hostilities. The Convention stated that the contracting parties, "Anxious to insure the security of international commerce against the surprises of war, and wishing, in accordance with modern practice, to protect as far as possible operations undertaken in good faith and in process of being carried out before the outbreak of hostilities, have resolved to conclude a Convention to this effect."

He cited articles 1 and 2 of the Convention, which are as follows:

Article 1: "When a merchant-ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated to it. The same principle applies in the case of a ship which has left its last port of departure before the commencement of the war and has entered a port belonging to the enemy while still ignorant that hostilities have broken out."

Article 2: "A merchant-ship which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the preceding Article, or which was not allowed to leave, may not be confiscated. The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation."

Great Britain had signed this Convention; Germany had also signed it, but under reservation of article 3, and of article 4, paragraph 2.

Applying the principle laid down in these articles, on the commencement of war on August 4, an Order in Council, dated August 4, 1914, was made, by which it was ordered (article 1) that after the publication of the Order no enemy merchant ship

should be allowed to depart from any British port and certain other ports except in accordance with the Order; and (article 2) that in the event of one of His Majesty's Principal Secretaries of State being satisfied by information reaching him not later than midnight on August 7, that the treatment accorded to British merchant ships and their cargoes, which at the date of the outbreak of hostilities were in the ports of the enemy or which subsequently entered them, was not less favourable than the treatment accorded to enemy merchant ships by articles 3-7 of this Order, certain notifications should be given, and articles 3-8 of this Order should thereupon come into full force and effect. Article 3 of this Order provided that, subject to the provisions of this Order, enemy merchant ships, which at the date of the outbreak of hostilities were in any port in which this Order applies, should be allowed till midnight on August 14 for loading or unloading their cargoes, and for departing from such port. The Government of this country had reason to think that the German Government were contemplating similar action, but though every effort was made from August 4 till August 7 to get a satisfactory assurance that exchanges would be effected, the Government were not able to get it, and had no option but to act accordingly. Therefore articles 3-8 of the Order in Council of August 4, 1914, did not come into force; and effect could not be given to article 1 of Convention VI.; and article 2 depended on article 1.

[SIR SAMUEL EVANS (THE PRESIDENT).—So far as the information of the Crown extends, has Germany acted in accordance with article 1?]

It is not known that the German Government has released our ships in accordance with the article. Sir Edward Grey stated to the Lords Commissioners of the Admiralty that he had no information which justified the opinion that a corresponding arrangement with regard to the releasing of our ships had been made by Germany.<sup>1</sup> There being no reciprocal arrangement that ships should be released, the *Chile* has been detained, and the Court has jurisdiction to deal with her. In view of the language of article 2 he should ask for an order which would not involve the instant condemnation of the ship. The Crown was concerned on its part carefully to observe the letter and the spirit of any

(1) See Notices by the Secretary of State for Foreign Affairs, published in the *London Gazette*, August 11, 1914.—REPORTER'S NOTE.

Convention entered into at The Hague, and his suggestion was that the proper decree would be: that the *Chile* was liable to condemnation as belonging at the time of capture to the enemies of the Crown, and was seized in such circumstances as would entitle her to detention in lieu of confiscation. He asked for a decree of detention accordingly, with liberty to apply to the Court. This order would preserve to the Court full control and jurisdiction over the ship, and recognise in the letter and the spirit the application of article 2. This order would suspend for the time being the transference of the property in the ship to the Crown, and consequently if, as the result of some disaster unconnected with the war, the ship was destroyed, the ownership of the vessel would still be in the original owners and not in the Crown.

[SIR SAMUEL EVANS (THE PRESIDENT).—There are two matters of importance I may have to consider—whether I am bound by the terms of The Hague Convention referred to; and, if so, what is the meaning of article 2?]

He suggested that there were really no distinctions between the extent to which the Court was bound by the Convention and the extent to which the jurisdiction or procedure of the Court was affected by an Order in Council. He submitted that the Court was bound by the Convention, which was an international contract. It stood in the same position as the Declaration of Paris, which, he submitted, must be treated as modifying the common law.

[SIR SAMUEL EVANS (THE PRESIDENT).—If I am bound by article 2, what is the meaning of it?]

He understood it meant that at the end of the war a merchant ship satisfying the conditions of article 2 would be restored, without payment of compensation by the Government. He did not understand that meantime the property of the ship would pass from the owners to the British Crown and then pass back again at the end of the war. If, for instance, the ship were lost during the period of detention, the Government would not be responsible for the loss. The procedure for which he asked meant that the ship should be so dealt with by the Prize Court as to enable article 2 to be applied at the end of the war. The decree for which he asked was that the *Chile* was adjudged to have belonged at the time of her capture and seizure to the enemies of the Crown, and as such to have been rightly seized,

and that on the application of the Procurator-General for Court order her to be detained until further order, with liberty to apply—see the Prize Court Rules, 1914, Order XXVIII. rule 1.

*Bateson, K.C.*, and *C. R. Dunlop*, for the owners of the *Chile*.—The writ was addressed to the owners and parties interested in the ship, and they were therein commanded by the Crown to cause an appearance to be entered for them. In pursuance of this writ the owners now appeared. An affidavit was put in by a member of the firm of *Wendt & Co.*, of *Lime Street, E.C.*, agents of the owners and underwriters of the *Chile*, which stated that the *Chile* was lying in the port of *Cardiff* when war was declared to exist between Great Britain and Germany, and that before she could leave she was seized and taken as prize. Restitution of the *Chile* had been formally claimed upon the ground that confiscation of the vessel would cause injury to peaceful and unsuspecting commerce, and would be contrary to the provisions of The Hague Convention No. VI., and upon any other ground which might appear in the course of these proceedings or otherwise. Alternatively, and upon the same grounds, it had been formally claimed that the *Chile* should be detained during the continuance of hostilities, and should be released upon the termination thereof.

[*SIR SAMUEL EVANS (THE PRESIDENT)*.—If the shipowners are subjects of the German Empire, they have no right to appear in this Court.]

By article 23 of the Annex to Convention IV. of the Second Hague Peace Conference, 1907, “. . . . It is particularly forbidden— . . . (h) To declare abolished, suspended, or inadmissible the right of the subjects of the hostile party to institute legal proceedings.” It is therefore still more clear that a defendant should be allowed to appear, which is also in accordance with natural justice. It is contemplated by the Prize Court Rules, 1914, that an alien enemy can appear in the Prize Court. An alien enemy can appear in this Court to shew that his property is protected from capture by an Order in Council or by the law of nations—*THE FENIX* [1854] (Spinks, 1; 2 Eng. P.C. 238).

[*SIR SAMUEL EVANS (THE PRESIDENT)*.—“In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain in the language of the

civilians a *persona standi in judicio*. . . . The same principle is received in our Courts of the law of nations. They are so far British Courts that no man can sue therein who is a subject of the enemy, unless under particular circumstances that *pro hac vice* discharge him from the character of an enemy, such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hac vice*”—THE HOOP [1799] (1 C. Rob. 196, 201; 1 Eng. P.C. 104, 107). It is clear that an alien enemy has no right to appear in this Court to argue a question of International Law. Could the Court make an order against the owners for costs?]

Yes, if they appear.

[SIR SAMUEL EVANS (THE PRESIDENT).—The next question is, what would be the value of the order?]

There is provision in the Rules for ordering security for costs.

[SIR SAMUEL EVANS (THE PRESIDENT).—One thing is clear. The affidavit is wholly insufficient. It does not say who are the owners of the vessel, or how they claim to appear.]

The Attorney-General (Sir John Simon, K.C.), invited by the Court to deal with the question raised by counsel for the owners, said he would rather defer doing so until the question really arose. He submitted that the affidavit was wholly insufficient, and that therefore the Court must decide on that ground that the owners could not appear. As regards the larger question as to the right of an alien enemy to appear, he would consider an argument which might hereafter be presented to the Court. It was not desirable to arrive at a hasty conclusion on the subject.

. As to the question of costs, he would ask the Court to deal with it in the following manner. He submitted it was entirely consistent with article 2 of Convention VI. that the Court should indicate its intentions if, hereafter, application was made to it under any liberty to apply, to provide for costs by saying that costs must be paid as a condition precedent to the return of the ship.

Lewis Noad, for the Cardiff Railway Co.—Considerable sums had accrued due and were still accruing due to the Cardiff Railway Co. He asked for liberty to apply should occasion arise. As there was to be no condemnation of the *Chile*, the company's rights, whatever they were, would be preserved. The company appeared to have certain rights—THE VROW SARAH

[1803] (1 Dodson, 355*n*; 2 Eng. P.C. 185*n*). It was desired to preserve them in respect of the decree which was to be made against the *Chile*. If, for instance, the vessel should be ordered to be moved out of the custody of the dock company, it was desired to have liberty to apply.

[SIR SAMUEL EVANS (THE PRESIDENT).—The only cases which I am aware of, where dock dues have been allowed, are where the captor has paid them, and has been allowed to take credit for them.]

[*The Attorney-General (Sir John Simon, K.C.)*.—Though I cannot give any undertaking, the fact that the Cardiff Railway Co. are British subjects will no doubt be taken into consideration. I have no objection to there being liberty to apply.]

SIR SAMUEL EVANS (THE PRESIDENT).—We all deplore the causes which have rendered it necessary that a Prize Court should sit again within these realms,\* after the happy lapse of about sixty years. As you, Mr. Attorney-General, have said, in times past—and particularly during the latter part of the eighteenth century and the earlier part of the nineteenth century—the English Prize Courts pronounced decisions which commanded general confidence, and received the admiration of all the countries interested in the law of nations. Our predecessors have set splendid examples and have created great traditions, and the Prize Court to-day will do its best—it cannot do more—to follow those examples and uphold those traditions.

This first case is that of a vessel which was seized by the Customs House officers in the port of Cardiff. It is clear upon the ship's papers that the ship was a merchant ship belonging to an enemy country, and it is clear also that by International Law the Crown was entitled to seize this ship by its officers in the port of Cardiff, although the ship was there before the commencement of hostilities. I therefore declare that this was an enemy ship, and that she was properly seized by the officers of the Crown as a *droit of Admiralty* to which the Crown is entitled.

Several matters have been discussed in the course of this case with reference to what ought to be done, having regard to the law of nations upon the one hand, and to the Second Hague Peace Conference, 1907, Convention VI. arts. 1 and 2, on the other hand. I propose to make an order which will

not finally determine the rights of the Crown in this case. The view has been put forward that article 2 may have to depend upon article 1, and therefore it would not come into force if no days of grace were agreed within the meaning of article 1. It is possible that that argument may be well founded, but I do not deal with that to-day. The Crown is entitled, if it sees fit, to ask for less than the law could give. Therefore I need not determine finally the question which may arise hereafter, as to what are the full rights of the Crown as seizors of the vessel in port.

The writ was issued by the Procurator-General in the form prescribed by the rules, and it has been duly advertised. Pursuant to the advertisement, certain persons, who are agents for the enemy shipowners apparently, have appeared in this Court by counsel, but in the course which the case has taken, counsel for these agents of the shipowners did not find it necessary, even if he had the right, to argue any matter before the Court.

I raised the point, as I was bound to do, I think, as to whether the enemy shipowners had any right to appear. That matter, however, I leave undecided, acceding readily to the request of the Attorney-General in that behalf; but I do decide for the purpose of to-day that the affidavit which has been filed, and which must be filed before appearance can be entered by an enemy subject, is wholly insufficient. For that reason I strike out the appearance entered for the shipowners. The Cardiff Railway Co. have also appeared by counsel, claiming for certain dues; but, though I make no order in their favour, I do not think that the order which I make will interfere with any rights which they may have.

I pronounce the *Chile* to have belonged at the time of the seizure to enemies of the Crown, and to have been properly seized by the officers of the Crown as lawful prize and droit of Admiralty; and on the application of the Crown I order that the ship be detained by the Marshal until a further order is issued by the Court. Any question of costs which the Crown may desire to raise will be reserved till such further order; and I give liberty to apply.

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*Solicitors*—Treasury Solicitor, for Procurator-General; Stokes & Stokes, for agents of owners of *Chile*; Torr & Co., agents for Corbett, Chambers & Harris, Cardiff, for Cardiff Railway Co.

[Reported by Arthur Pritchard, Esq., Barrister-at-Law.]



## [ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). NOV. 30, 1914.

## THE SCHLESSEN.

*Prize Court—Enemy Ship—Submarine Signalling Apparatus—Lease to Shipowners—"Neutral goods"—Declaration of Paris, 1856, art. 3.*

*A submarine signalling apparatus, fixed partly in the fore hold and partly in the chart room of an enemy's ship, was claimed by a neutral company who, as they alleged, leased the apparatus to the owners of the ship on terms which provided that rent should be paid and that the apparatus should remain the sole and exclusive property of the company:—Held, that the apparatus was not "neutral goods" under enemy's flag within article 3 of the Declaration of Paris, 1856, as "goods" there meant merchandise, which this was not; and that this apparatus being a part of the ship must in the Prize Court be condemned with the ship.*

Cause for condemnation of a vessel as prize.

The *Schlesien* was a German steamship of 5,536 tons gross, registered at the port of Bremen and belonging to the North German Lloyd Co. She was captured by H.M.S. *Vengeance* in the Bay of Biscay, and was taken into Plymouth, and was found to have a large miscellaneous cargo on board.

The *Schlesien* was fitted with a submarine signalling apparatus, by means of which sounds passing through the water were received on board and indicated in the chart room. The apparatus consisted of two iron boxes fixed one on each side of the ship in the fore hold, with wires leading to an indicator fixed in the chart room.

The claimants were the Submarine Signal Co., incorporated under the laws of the State of Maine in the United States, who claimed the submarine signalling apparatus as their property. An affidavit by the general manager of the company stated that the company leased this apparatus to shipowners on payment of a yearly rent—in the case of the *Schlesien*, 1,365 marks; that the arrangements for the leasing of the apparatus for the *Schlesien* were made by the company's agency at Bremen, which had no power to vary the usual set form of lease, but the original

lease was in Germany and could not be obtained, and the company had no copy of it, as the practice was simply to notify the head office of the rental; that the terms of the lease were to the best of the knowledge, information, and belief of the deponent substantially the same as those in a form of lease used in England and exhibited by the affidavit; and that by this form of lease it was provided that the apparatus should at all times remain the sole and exclusive property of the company, and the subscriber should have no right of property therein, and on failure to pay rent or on breach of any other covenant the company should have the right to terminate the lease, and upon the expiration or termination of the lease the company should have full power to enter upon the vessel and take possession of and remove the apparatus.

*Colin Smith* (with him *Geoffrey Lawrence*, who was serving with His Majesty's Forces), for the Procurator-General, applied for the condemnation of the *Schlesien*.

*Leslie Scott, K.C.*, and *C. Robertson Dunlop*, for the claimants.—This apparatus is the sole property of the claimants and should not be condemned. Though the original lease cannot be produced, in time of war the Court should look at such evidence as is available and should accept the statements in the affidavit. The affidavit negatives any suggestion that the agents at Bremen could be carrying on a separate business or could have any proprietary interest in the apparatus. If this is not sufficiently proved, an adjournment should be granted for further evidence. These are "neutral goods" within article 3 of the Declaration of Paris, 1856, and therefore are not liable to capture. If, on the other hand, "neutral goods" in that article can only be cargo, still this claim falls within the principle of the Declaration of Paris, which is that neutral property should not be confiscated. The object of prize is to seize property of the enemy and so bring pressure to bear on him, and this object is not obtained by condemning neutral property.

*Colin Smith* replied.

SIR SAMUEL EVANS (THE PRESIDENT).—I condemn this vessel as prize and order her to be sold. With regard to the submarine signalling apparatus, it is said that it is the property of an

American company. In the affidavit which has been put in it is stated that the instrument was supplied through an agency of the company at Bremen. I know nothing about the constitution of this so-called agency, and the lease of the apparatus is not produced. There is not enough evidence to enable me to say that the apparatus belonged to the American company and did not belong to the Bremen agency.

I am willing, however, to assume that the terms as to the ownership of the property are comprised in a document in the form of the lease which has been exhibited. The argument of counsel for the claimants was, that by the express terms of the Declaration of Paris the apparatus ought to be protected as "neutral goods." It is true that the words "neutral goods" and "enemy's goods" are used in the Declaration, but until now those terms have always been read as applying to cargo carried in the ship. In the French text of the Declaration the words in each instance are "*la marchandise*," and it is quite clear that they are intended to cover merchandise. This apparatus was not merchandise.

Then counsel for the claimants contended that the claim was "within the spirit of the Declaration of Paris." The intention of the Declaration was to make things during a state of war as easy and as little disturbing as possible to those engaged in neutral commerce. It is obvious, however, that in a ship of modern construction many kinds of apparatus similar to the one in question might be installed and form part of the ship. I am far from saying that if such things can be easily detached they ought not to be handed over by the captors, if they think fit, to the persons who appear to be the owners. Such things as private chronometers, compasses, or sextants belonging to the captain and crew of a vessel have been given up, and I have given general directions to the Marshal that such things should be given up. But that is wholly different from stating that claimants have a right to come to this Court and say, "This particular piece of apparatus affixed to this vessel belongs to me, and I request you to adjudicate upon it." The Prize Court does not exist for this purpose. It exists for the purpose of saying whether, having regard to the ship as it stands, it is a subject-matter fit for condemnation as prize. I have condemned this ship as prize, and I consider that I am not called upon to investigate questions of property in different parts of the ship,

as to whether they have been leased, and whether the property in them remains in the original lessors. It is of great importance to do what is fair and right to neutrals, but in a claim of this description the matter must be dealt with by the Executive and those who advise the Crown; and if they think it clear that this property belonged to American owners they can deal with it accordingly. As far as this Court is concerned, the apparatus is to be considered as part of the ship which is condemned.

[Leave was given to appeal to the Privy Council.]

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*Solicitors*—Treasury Solicitor; Waltons & Co.

[*Reported by Arthur Pritchard, Esq., Barrister-at-Law.*]

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[ADMIRALTY. . IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). . Oct. 12, 15, 1914.

### THE TOMMI; THE ROTHERSAND.

*Prize Court—Enemy Ships—Sale Before War—Enemy Flag—Invalid Transfer—Detention—British Ship—English Company of Alien Shareholders—Déclaration of London, 1909, arts. 55, 56, 57.*

On August 1, 1914, a German company, owning two German sailing vessels, both at sea and bound for ports in the United Kingdom, offered by telegram to sell them to an English company, which telegraphed acceptance. The vessels arrived in the ports, and were seized by Customs officers after war had been declared on August 4 between Great Britain and Germany. The English company claimed the vessels as having become their property by a valid transfer :—Held, that the vessels were enemy property, first, because the nationality of a vessel is determined by the flag which she is entitled to fly, whether at sea or in port, and that the flag which these vessels were entitled to fly was German and secondly, because the alleged transfer was not valid, but was incomplete in certain respects, and amounted in substance to a mere arrangement by the German company that the vessels should be called British ships; and that the claim must be dismissed and an order made for the detention of the two vessels.

*Quære, whether an English company, consisting entirely of aliens, can own a British ship.*

Causes for the detention of two vessels as enemy property, tried together.

The claimants in each cause were the Sugar Fodder Co., Lim., a private company incorporated under the Companies (Consolidation) Act, 1908, dealers in and manufacturers of cattle foods. The nominal capital of the company was 20,000*l.*, divided into 20,000 shares of 1*l.* each. The number of shares issued was 5,001, which were held as follows:

Rudolph Schrader, Hamburg	...	...	150
Julie Schrader, Hamburg	...	...	100
Carl Fritz Gunther, Blackheath	...	...	151
Tilly Gunther, Blackheath	...	...	100
Norddeutsche Kraftfutter Gesellschaft, M.B.H., Hamburg	...	...	4,500

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5,001

The managing directors of the Sugar Fodder Co., Lim., the claimants, sometimes called the English company, were Carl Fritz Gunther and Rudolph Schrader until September 1, when, according to the evidence, Rudolph Schrader was removed by resolution. According to the evidence, Carl Fritz Gunther and Rudolph Schrader each held half the shares in the Norddeutsche Kraftfutter Gesellschaft, called the German company, which traded in cattle fodder, and there was considerable trading between the English and German companies.

The *Tommi* and the *Rothersand* were German sailing vessels fitted with tanks for holding treacle, and were owned by the German company until August 1, when, according to the claimants' case, both vessels while at sea were sold to the claimants.

The *Tommi* sailed from Dantzig about the middle of July with a cargo of liquid molasses consigned to the claimants. She called at Cuxhaven, and left there on July 28 bound for Gravesend. She arrived at Gravesend on August 5, and was there seized as enemy property by the collector of Customs. The Procurator-General afterwards released the cargo to the claimants.

The *Rothersand* was chartered from Falmouth to Kirkcaldy. She left Fareham on July 17, arrived at Kirkcaldy on August 2, and on August 5 was there seized as enemy property by the officer of Customs.

The facts as to the sale of the *Tommi* for 30,000 marks, equal to about 1,500*l.*, and of the *Rothersand* for 35,000 marks, equal to about 1,750*l.*, to the claimants by the German company, are stated in the judgment.

The claimants claimed in each cause, as owners of the ship, for the ship and for demurrage and all losses, costs and charges, damages and expenses incurred by reason of the capture.

Oct. 12, 15, 1914.—*Aspinall, K.C.*, and *Rayner Goddard*, for the Procurator-General, in the cause of the *Tommi*.

*Bateson, K.C.*, and *Rayner Goddard*, for the Procurator-General, in the cause of the *Rothersand*.

*Laing, K.C.*, and *Arthur Pritchard*, for the claimants.

On behalf of the Procurator-General it was contended that each vessel was flying the German flag when seized, and this was conclusive as to its enemy character—*THE VROW ELIZABETH* [1803] (5 C. Rob. 2; 1 Eng. P.C. 409); that the alleged contract of sale was invalid, not being by bill of sale—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 24; that as the shareholders in the English company were all German, neither ship could become a British ship—Merchant Shipping Act, 1894, ss. 1 and 9; that to make the transfer from the German company good the claimants must prove that the property was *bona fide* and absolutely transferred and this proof was lacking, as the alleged sale was informal and there was no document of transfer; that the *bona fides* of the sale was questionable, and the sale was probably made in fear of a European war involving Great Britain; and that the sale was bad because the interest of the enemy seller, the German company which controlled the English company, was preserved—*THE SECHS GESCHWISTERN* [1801] (4 C. Rob. 100; 1 Eng. P.C. 363).

On behalf of the claimants it was contended that the sale under the circumstances was *bona fide* and absolute, as was shewn by the documents, and was made to remove the vessels from trading in the Baltic Sea and protect them from seizure by Russia in case of war with Germany; that this was a valid transfer as in *THE ARIEL* [1857] (11 Moore P.C. 119; 2 Eng. P.C. 600) and *THE BALTICA* [1858] (11 Moore P.C. 141;

2 Eng. P.C. 628); that no bill of sale was required, as section 24 of the Merchant Shipping Act, 1894, applied only to the transfer of a British ship; that by English law the property in each vessel passed to the claimants when the contract was made—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 17 and 18; that the vessels became the property of the claimants, and could be used, for instance, as hulks, whether they could be registered during the war or not; that though the enemy flag was binding when assumed at sea, this did not apply to a vessel which had arrived in port and was intended by its owners to have its national character changed—*THE VIGILANTIA* [1798] (1 C. Rob. 1; 1 Eng. P.C. 31) and *THE SUCCESS* [1812] (1 Dodson, 131; 2 Eng. P.C. 140); that the English company was an artificial creation of the Legislature, and the law could only recognise that artificial existence and not the individual interests or national characters of the shareholders—*SALOMON v. SALOMON & Co.* [1896] (66 L. J. Ch. 35; [1897.] A.C. 22); and that this company, being a private company, was specially favoured by the Legislature—*Palmer's Company Law* (9th ed.), p. 362; that in the Prize Court the question was as to the commercial domicile of the claimant—*Dicey, Conflict of Laws* (2nd ed.), p. 740—and the commercial domicile of the English company, which carried on business and had a factory in England, was British; that the object of making prize of private property was to decrease the resources of the enemy or to punish hostile acts by neutrals or nationals, and that the claimants, by their purchase of these vessels, had kept them from being recalled to Germany, and had paid for them, according to their case, by a book entry debiting an account of Carl Fritz Gunther with the German company, and had thereby acted in the interest of Great Britain, and that as regards *bona fides*, the transfer would not have been and was not made in expectation of Great Britain going to war, and that until August 4 it was not expected even in Germany that Great Britain would go to war—see Sir Edward Goschen's despatch, August 8, in *Great Britain and the European Crisis*, p. 78—one ground for this being that Great Britain had not gone to war in 1864 to defend Denmark against Prussia and Austria—see *Paul's History of England*, vol. 2.

SIR SAMUEL EVANS (THE PRESIDENT).—The claims in these cases are made by the Sugar Fodder Co., Lim., to the

ownership of two vessels, one called the *Tommi* and the other called the *Rothersand*, which have been seized in British ports. Both were seized after the outbreak of hostilities between this country and Germany, the date of the seizure being in both cases August 5. These ships belonged to a German company which is called the Norddeutsche Kraftfutter Gesellschaft. Some time in July these ships left the ports of Germany, and were on August 1, the important date in this case, both on the high seas. It is said that the ships were sold *bona fide*, and that a sufficient transfer took place from the original owners to the alleged new owners, the Sugar Fodder Co., Lim., while the ships were in transit.

The facts are simple. The first that this Court knows of negotiations between the parties comes from the letter of July 31, written by the English company to the German company, in which it is stated: "If *Tommi* should not arrive in time we are going to land this 100 tons on our wharf, so that we may make sure of this 100 tons should there be a European war, then, of course, there will be no chance whatsoever to ship any gluten feed, and of course all contracts would be cancelled. . . . Sailing vessels. If your sailing vessels (in case of war) should be in this country, we think it would be advisable if the Sugar Fodder Co. bought same, so that they may not be captured by any other nation."

On August 1 another letter was written by the English company to the German company, in which this passage appears: "*Tommi*. We note that she left Cuxhaven on the 28th. . . . Should *Tommi* arrive here and war has broken out, we will take *Tommi* as well as *Rothersand* over for our account, but we are not quite certain whether this transaction will stand good as both vessels are registered in Hamburg." In this last sentence the writer of the letter shewed an intelligent appreciation of what the law was, or what the law was likely to be.

On the same day there was received by the English company, after that letter was written, but before it reached its destination, this telegram from the German company: "August 1, 1914. We sell you *Tommi* for 30,000 marks and *Rothersand* for 35,000 marks. Wire acceptance.—Nordkraft." I do not know whether that is an offer to sell, or a direction from a director in Hamburg to the director over here saying, "You must take it that this company sells, whether you like it or not, and that



your company buys, the *Tommi* for 30,000 marks and the *Rothersand* for 35,000 marks, and you must wire acceptance." Whatever the proper reading of that telegram may be, an acceptance was sent immediately on August 1 by Mr. Gunther, acting for the English company: "Accept both sailing vessels *Tommi* and *Rothersand* for our account."

On the same day Mr. Gunther with an air of generosity offered the two vessels to the Admiralty for 12,000*l.*, at which price he or his company would in one day have the nice little profit of 8,760*l.*

On August 1 war began between Germany and Russia. These transactions between the two companies, whatever their effect may be, took place upon that day; and it is quite obvious, whether they took place after the hour when war was proclaimed or before, that in any event they took place when war was imminent. War was not declared between Germany and this country until August 4, and therefore at this time—August 1—this country was a neutral country. I have great doubt as to whether there was not an apprehension in the mind of Mr. Gunther, and I have graver doubt as to whether there was not an apprehension in the mind of Mr. Schrader in Hamburg, that war was imminent between Germany and this country at this time.

However that may be, I do not think it is necessary for the purpose of deciding this case to shew that they had the probability of war between this country and Germany in their minds. The transfer which is alleged to have taken place was a transfer in order to defeat the right of an imminent belligerent. Russia or any other belligerent would have a right to capture these vessels at sea if they remained German. The question is, whether or not such a transfer can be made so as to defeat the right of belligerents at that time, because that is the test. Of course, if the transfer could not be made, when Great Britain became a belligerent she had the right to seize these vessels on their arrival in port as belonging to a State at war with her.

There are three heads under which the case can be considered. In the first place, whatever may be the result properly to be attributed to this alleged transfer, these vessels were sailing under the German flag on August 5, and it is argued that the German flag proves their nationality, and they must be taken to be German and subject to seizure.

It is perfectly clear that if a ship does sail under a particular flag she enjoys the protection of the country whose flag she flies, and, unless there are very special reasons, she is regarded as belonging to that State. Counsel for the claimants said there was a distinction to be drawn between a capture at sea and seizure in port. But it does not matter in the slightest degree whether the flag was actually flying and hoisted at the mast. The question is, what flag she was entitled to fly; and in my view there is no distinction upon this part of the case between a ship captured at sea and a ship seized in port. The law, as it was understood, which says that the nationality of a ship depends upon the flag, was adopted in the Declaration of London by the parties which agreed to the Declaration. It is stated at the commencement of the Declaration that the rules laid down correspond in substance with the general recognised principles of International Law.

Article 57 of the Declaration of London says, "Subject to the provisions respecting transfer to another flag, the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly." As regards this article, there is an interesting comment by Monsieur Renault as follows: "*The principle, therefore, is that the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly.* It is a simple rule which appears satisfactorily to meet the special case of ships, as distinguished from that of other movable property, and notably of the cargo. From more than one point of view, ships may be said to possess an individuality; notably they have a nationality, a national *character*. This attribute of nationality finds visible expression in the right to fly a flag; it has the effect of placing ships under the protection and control of the State to which they belong; it makes them amenable to the sovereignty and to the laws of that State, and liable to requisition, should the occasion arise. Here is the surest test of whether a vessel is really a unit in the merchant marine of a country, and here therefore the best test by which to decide whether her character is neutral or enemy. It is, moreover, preferable to rely exclusively upon this test, and to discard all considerations connected with the personal status of the owner."

The flag which these vessels were entitled to fly at the time of their seizure was the German flag, and they could not at that time, if they ever could during the war, have the right to fly the

British flag. Therefore, if there were no other point in this case, I think the fact that these vessels were flying the German flag is enough to make them proper subjects of seizure as prize.

The second head under which the case may be dealt with is one which has been discussed at the Bar on both sides, as to whether these transfers were made *bona fide*, and I have come to the conclusion that they were not. If it were necessary to decide the point—I do not think it is, since if the transfer was incomplete that is sufficient answer—I could not bring myself to believe it was a *bona fide* transfer of the ownership. It was hardly more than this: “We understand you over there, and you understand us over here; our companies are mutually connected. We in Germany own nine-tenths of the shares in the British company; if war breaks out, whoever the belligerent is, let these ships be called British ships.” I think that is the real substance of the transaction. Apart from that, much more is needed to transfer a vessel in transit when war has been declared, or even when war is imminent, than was done in these cases.

These matters, naturally, have often been considered in the Prize Courts, but I will only refer to two cases dealing with this question of the transfer of property when the ship is on the high seas. The first case deals with the principle generally, although it affects cargo, and not the ship. This is *THE JAN FREDERICK* [1804] (5 C. Rob. 128; 1 Eng. P.C. 434), in which Lord Stowell said: “That a transfer may take place *in transitu*, has, I have already observed, been decided in two or three cases, where there had been no actual war, nor any prospect of war, mixing itself with the transaction of the parties: But in time of war this is prohibited as a vicious contract; being a fraud on belligerent rights, not only in the particular transaction, but in the great facility which it would necessarily introduce, of evading those rights beyond the possibility of detection. It is a road that, in time of war, must be shut up; for although honest men might be induced to travel it with very innocent intentions, the far greater proportion of those who passed, would use it only for sinister purposes, and with views of fraud on the rights of the belligerent. This, however, is not a contract made in time of war; and therefore an important question is raised, Whether the contemplation of war would have the same effect in vitiating these contracts as actual war? It cannot be said

that all engagements in the proximity of war, into which the speculation of war might enter, as for instance, with regard to the price, would therefore be invalid. The contemplation of war is undoubtedly to be taken in a more restricted sense. But if the contemplation of war leads immediately to the transfer, and becomes the foundation of a contract, that would not otherwise be entered into on the part of the seller; and this is known to be so done, in the understanding of the purchaser, though on his part there may be other concurrent motives, as in the case of *THE RENDSBORG* [1802] (4 C. Rob. 121), such a contract cannot be held good, on the same principle that applies to invalidate a transfer *in transitu* in time of actual war. The motive may indeed be difficult to be proved—but that will be the difficulty of particular cases: Supposing the fact to be established, that it is a sale under an admitted necessity, arising from a certain expectation of war; that it is a sale of goods not in the possession of the seller, and in a state where they could not, during war, be legally transferred, on account of the fraud on belligerent rights; I cannot but think that the same fraud is committed against the belligerent, not indeed as an actual belligerent, but as one who was, in the clear expectation of both the contracting parties, likely to become a belligerent, before the arrival of the property, which is made the subject of their agreement. The nature of both contracts is identically the same, being equally to protect the property from capture of war—not indeed in either case from capture at the present moment when the contract is made, but from the danger of capture, when it was likely to occur. The object is the same in both instances, to afford a guarantee against the same crisis: In other words, both are done for the purpose of eluding a belligerent right, either present or expected. Both contracts are framed with the same *animo fraudandi*, and are, in my opinion, justly subject to the same rule.”

It is quite clear from the facts of the present case and from what appears in the correspondence, that the origin of this transaction, which is said to have amounted to a transfer of the ships, was a desire to defeat the right of belligerents when war, which was then imminent, became an actual fact, as it did a few hours afterwards. The passage which I have read from the judgment of Lord Stowell is therefore as apt as it could possibly be to the circumstances of this case.

In the next case, *THE BALTICA* (11 Moore P.C. 141; 2 Eng. P.C. 628), the subject-matter, as I have said, was not the cargo, but the ship itself. The decision in this case was that the sale was valid, but the general principles are fully dealt with by Lord Kingsdown (then the Right Hon. T. Pemberton Leigh) in his judgment. He said: "The general rule is open to no doubt. A neutral while a war is imminent, or after it has commenced, is at liberty to purchase either goods or ships (not being ships of war) from either belligerent, and the purchase is valid, whether the subject of it be lying in a neutral port or in an enemy's port. During a time of peace, without prospect of war, any transfer which is sufficient to transfer the property between the vendor and vendee, is good also against a captor, if war afterwards unexpectedly break out. But, in case of war, either actual or imminent, this rule is subject to qualification, and it is settled that in such case a mere transfer by documents which would be sufficient to bind the parties, is not sufficient to change the property as against captors, as long as the ship or goods remain *in transitu*. With respect to these principles, their Lordships are not aware that it is possible to raise any controversy; they are the familiar rules of the English Prize Courts, established by all the authorities, and are collected and stated, principally from the decisions of Lord Stowell, by Mr. Justice Story, in his '*Notes on the Principles and Practice of Prize Courts*,' a work which has been selected by the British Government for the use of its naval officers, as the best code of instruction in the Prize Law. The passages referred to, are to be found in pp. 63, 64, of that work. The only question of law which can be raised in this case, is not whether a transfer of a ship or goods *in transitu*, is ineffectual to change the property, as long as the state of *transitus* lasts; but how long that state continues, and when, and by what means, it is terminated."

Lord Kingsdown then discusses the grounds on which the principle is based, and says: "There seem to be but two possible grounds of distinction. The one is, that while the ship is on the seas, the title of the vendee cannot be completed by actual delivery of the vessel or goods; the other is, that the ship and goods having incurred the risk of capture by putting to sea, shall not be permitted to defeat the inchoate right of capture by the belligerent Powers, until the voyage is at an end. The former, however, appears to be the true ground on which the

rule rests. Such transactions during war, or in contemplation of war, are so likely to be merely colourable, to be set up for the purpose of misleading, or defrauding captors, the difficulty of detecting such frauds, if mere paper transfers are held sufficient, is so great, that the Courts have laid down as a general rule, that such transfers, without actual delivery, shall be insufficient; that in order to defeat the captors, the possession, as well as the property, must be changed before the seizure. It . . . . . is true that, in one sense, the ship and goods may be said to be *in transitu* till they have reached their original port of destination; but their Lordships have found no case where the transfer was held to be inoperative after the actual delivery of the property to the owner."

It is admitted in the present case that there was no delivery of the ships; in fact, the captains on the vessels did not know anything about the sale, and no instructions were received, apparently, by them from the alleged purchasers in London until the ships had been seized, and the captains, apparently, had been interned. I have stated the principles which apply. I need not go into the details of the case to point out that nothing was arranged as to when the purchase money was to be paid, as to when the completion was to take place; and indeed it is not shewn that any satisfactory arrangement was made by the English company that they, and not the person who is said to have bought the vessels (Mr. Gunther), should become the purchasers.

I have referred to article 57 of the Declaration of London, which deals with the effect of the flag. I will now consider shortly the views adopted in the Declaration of London as to what was the law of nations as regards the transfer of an enemy vessel to a neutral flag. There are two articles in the Declaration of London, one dealing with a transfer effected before, and the other with a transfer effected after, the outbreak of hostilities. Article 55 provides: "The transfer of an enemy vessel to a neutral flag, effected before the outbreak of hostilities, is valid, unless it is proved that such transfer was made in order to evade the consequences to which an enemy vessel, as such, is exposed. There is, however, a presumption, if the bill of sale is not on board a vessel which has lost her belligerent nationality less than sixty days before the outbreak of hostilities, that the transfer is void. This presumption may be rebutted. Where

the transfer was effected more than thirty days before the outbreak of hostilities, there is an absolute presumption that it is valid if it is unconditional, complete, and in conformity with the laws of the countries concerned, and if its effect is such that neither the control of, nor the profits arising from the employment of, the vessel remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than sixty days before the outbreak of hostilities, and if the bill of sale is not on board, the capture of the vessel gives no right to damages."

Article 56 provides: "The transfer of an enemy vessel to a neutral flag, effected after the outbreak of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed. There, however, is an absolute presumption that a transfer is void: (1) If the transfer has been made during a voyage or in a blockaded port. (2) If a right to purchase or recover the vessel is reserved to the vendor. (3) If the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing, have not been fulfilled."

Apart from the Declaration of London, and whatever alteration that may make in the law of nations, these artificial periods of time which have been agreed upon by the various nations—namely, thirty and sixty days—cannot be found in any decision of any particular Prize Court belonging to any country. They are conventional periods. I refer, however, to articles 55 and 56 to shew, first, that the basis of the whole thing must be that the transfer was not made in order to avoid the consequences to which the enemy vessel supposed to be transferred might be exposed by the action of any belligerent; and secondly, that in any event, even after a lapse of time like thirty days, the transaction must have been completed not merely by letters and telegrams passing, but by formal documents necessary to complete the title being executed. In this case there is an absence of any such documents.

I have come to the conclusion, therefore, without any doubt, that this alleged transfer was not valid, and that, notwithstanding the transactions which took place between the two companies or the two directors, these ships remain, for all purposes connected with the Prize Court, German ships. Inasmuch as counsel for the claimants argued the point, I will just notice in

passing that the provisions as to when property passes, which are very difficult to determine when dealing with municipal law, are not regarded as being anything like conclusive, or indeed are hardly looked upon at all, when a Prize Court is determining what the character of a vessel was at a particular time. It is quite clear in many cases that both ships and the cargoes of ships which might very well be said to pass under municipal law would be subject to seizure and capture under prize law. These technicalities, as regards the passing of property, have not been allowed to bind the Prize Courts. They have been treated rather as gossamer, which can be brushed aside, and the Prize Court regards the essential qualities of any transaction, and tries to arrive at the realities of the case.

The third aspect of the case which I will mention, but upon which I am not called upon to pronounce any decision, is this. It must not be assumed, even supposing I were in favour of the claimants on the first two points—that is to say, even if the English company became the purchasers—that I should decide that this ship was immune from seizure.

The two companies, German and English, were most intimately connected. The English company consisted of only five shareholders. They were Mr. Rudolph Schrader (the director in Germany, who affected to sell the ships) and his wife, Mr. Gunther and his wife, and the German company itself, which owned 4,500 shares out of the 5,001 shares of the English company; that is to say, nine out of every ten shares were owned by the German company, and there was not a single shareholder in the English company of British nationality. In fact, they are all citizens of the German State.

The policy of our municipal law is that no alien can own any share in a British ship. That is provided by the Merchant Shipping Act, 1894. No doubt it is the case that a company registered in this country under the Companies Acts is a separate entity, and such a company can own a ship. Whether a company consisting entirely of aliens can own a British ship, is a question which probably has never arisen, and which has never, therefore, been decided. I am not sitting here dealing with municipal law to-day, and therefore I am not called upon to decide that question; but I do not want it to be assumed that the Prize Court could not say, looking at the realities of this thing, that, even if the transfer had been completed, and if the shareholders



in the British company had become the purchasers, these vessels ought not to be regarded as German ships. I am not deciding that question, but inasmuch as the matter has been discussed I have thought it desirable to express the view that I take upon the point.

In the result the claim of this company must be rejected, and I make an order, as in *THE CHILE* [1914] (*ante*, p. 1; 84 L. J. P. 1; [1914] P. 212), for the detention of these ships, the *Tommi* and the *Rothersand*.

*Bateson, K.C.*—I ask that the freight of the *Rothersand*, in the hands of the collector of Customs, should be paid into Court.

SIR SAMUEL EVANS (THE PRESIDENT).—Yes.

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*Solicitors*—Treasury Solicitor, for Procurator-General; W. R. J. Hickman, for claimants.

[Reported by Arthur Pritchard, Esq., Barrister-at-Law.]

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[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). Oct. 7, 26, 29, 1914:

THE BERLIN.

*Prize Court—Deep-sea Fishing Vessel—Exemption from Capture—Coast Fishing Vessel—Hague Conference, 1907, Convention No. XI. art. 3—Practice—Legal Evidence of Capture—Other Evidence—Prize Court Rules, 1914, Order XV. rules 1, 2 (e).*

*An enemy vessel, which is shewn by her size, equipment, and voyage to be a deep-sea fishing vessel engaged in a commercial enterprise which forms part of the trade of the enemy country, is not within the category of coast fishing vessels, so as to be exempt from capture, but is good prize.*

*The commander of one of His Majesty's ships who cannot take a captured vessel into port, or put a prize crew on board, ought to enter the time and place of capture in the vessel's log, or make a declaration in the presence of the vessel's master, so*

as to provide direct legal evidence thereof. But in the absence of such evidence, the Court can act on other evidence or reliable information, and draw inferences therefrom under the Prize Court Rules, 1914, Order XV. rules 1, 2 (e).

The *Berlin* was a German fishing vessel, and her description and the circumstances of her capture are stated in the judgment. The evidence before the Court, besides the ship's papers which proved the nationality of the vessel, consisted of an affidavit by the chief officer of Customs at Wick and a translation of the log. It appeared from the affidavit of the chief officer of Customs at Wick that the mate of the steamship *Ailsa* had sent for him to his office at 6.30 A.M. on August 6, and had stated to him that, when the *Ailsa* was ninety to ninety-five miles E.S.E. of Wick, she was requested by one of His Majesty's ships to take the captured *Berlin* to Wick. A confidential report made to the Admiralty, and shewing that the time of capture was 11.30 A.M. on August 5, was disclosed to the Court, but was not otherwise made public. The case came before the Court on October 7 in the first instance, and then stood over for some further evidence.

Oct. 26, 1914.—*Arthur Pritchard*, for the Procurator-General.—The Court may act on such evidence of the capture as it may admit—Prize Court Rules, 1914, Order XV. rules 1, 2 (e). The *Berlin* is enemy property, and no claimant has appeared. The only ground which could be suggested for exemption of this vessel from capture would be in connection with coast fishing. This ground of exemption is formulated in article 3 of Convention No. XI. of The Hague Conference, 1907, but though that Convention was signed by Great Britain and Germany, it was not signed by all the belligerents in this war, and therefore, by article 9, its provisions do not apply in this war. Even if it applied, the *Berlin* was not a vessel "employed exclusively in" (or, as it has been better translated, "destined exclusively for") "coast fishing," as is shewn by the places where she had been fishing and the depths of water, and by her equipment for salting the herrings in barrels, and by her size and build. Also, she was fishing for herrings, and the coast of Scotland was the only coast at all near, but her fishing did not approach "the coasts of Scotland," because that means

within three miles from the mainland or adjacent islands—Herring Fisheries (Scotland) Act, 1867 (30 & 31 Vict. c. 52), s. 11. Vessels engaged in deep-sea fishing, as the *Berlin* was, are liable to capture by the prize law of Great Britain and other nations—*Hall's International Law* (6th ed.), p. 447; *Westlake's International Law*, Part II. "War," p. 155; and by the prize law of Germany—*Holtzendorff, Handbuch des Völkerrechts*, vol. 4, p. 585 ("Schiffe, welche grosse Fischerei betreiben, unterliegen der Wegnahme wie Handelsschiffe"—Vessels which are engaged in deep-sea fishing are liable to capture, like trading vessels). In *THE PAQUETE HABANA; THE LOLA* [1900] (175 U. S. 677; 189 U. S. 453; *Pitt Cobbett's Leading Cases on International Law*, Part I. p. 1), after a full review of the authorities, it is stated that the exemption has not been extended "to ships or vessels employed on the high sea in taking whales or seals, or cod or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce"; so that the *Berlin* is not within the exemption. In English prize law an exemption, even of small fishing vessels, has been held to be a rule of comity only, and not of decision—*THE YOUNG JACOB AND JOHANNA* [1798] (1 C. Rob. 20).

*Cur. adv. vult.*

Oct. 29.—SIR SAMUEL EVANS (THE PRESIDENT).—The Crown asks for the condemnation of the sailing ship, the *Berlin*, and her cargo as enemy property. No claim has been made in respect thereof. It is nevertheless necessary to investigate the facts, and particularly to ascertain whether by International Law the ship is immune from capture as a fishing vessel. The *Berlin*, as appeared from the ship's papers, was a German fishing cutter of 110 metric tons, built in 1892, and manned by a crew of fifteen hands. She belonged to the port of Emden, and was owned by the Emden Herring Fishing Co. of Emden. She had on board three hundred and fifty empty barrels, one hundred barrels of salt, fifty barrels of cured herrings, and ship's stores in fifteen barrels. She carried one boat and had two drifts of nets, consisting of forty-two and forty-three nets each drift, two bush ropes, and a small steam boiler and capstan. The vessel, as appeared from her log, had been on a fishing voyage in the North Sea for a considerable time. From July 27 onwards she had been catching herrings, fishing in latitudes between

55 degrees and 58 degrees 30 minutes north, and in longitudes between 1 degree east or west, and in depths of from 66 to 148 metres. Her position on August 1 and 2, as given in her log, was latitude 55 degrees 35 minutes north, and longitude 0 degrees 32 minutes east, and on August 4 and 5, latitude 58 degrees 28 minutes north, and longitude 0 degrees 33 minutes east. She was at these times, therefore, far out in the North Sea, at distances 100 miles, more or less, from the nearest coast—namely, Great Britain—and 500 miles, more or less, from her home port, and from the German coast.

She was brought into the port of Wick in the early morning of August 6 by the steamship *Ailsa*, and given into the possession of the chief officer of Customs, who detained her as prize captured at sea.

There was no direct evidence in the legal sense, as used in our municipal Courts of law, of her capture by one of His Majesty's ships or of the place or time of her capture. It was reported to the officer of the steamship *Ailsa* that she had been captured by H.M.S. *Princess Royal*, and by him that she was handed over by the commander to the *Ailsa* to be taken into Wick Harbour. I saw a confidential report of the capture made in the course of his official duty by the commander of H.M.S. *Princess Royal*, and it appeared that the exigencies of war rendered it necessary for him to request the *Ailsa* to take the captured vessel to Wick harbour on his behalf. It appeared also that the capture took place at 11.30 A.M. on August 5. I should, apart from this, have presumed that the capture was not made until after war was declared on August 4 (11 P.M.). When the capture took place the vessel was in the North Sea in the position which I have approximately stated.

It would have been advisable, inasmuch as His Majesty's ship was unable to take the captured vessel to port, or to put a prize crew upon her for the purpose, for the commander to enter the time and place of capture in the vessel's log, or to make a declaration in the presence of the vessel's master, lest objection might be made of the absence of direct legal evidence. But fortunately, in this Court, I am entitled to act upon other evidence or reliable information, and to draw inferences therefrom, upon which the Court may think it safe and just to act. Eminent Judges (among them Lord Russell of Killowen) have commented upon the strict technicalities of some of the rules of

evidence in our Courts of law; and admirable and wholesome as they are in the main, it would appear that some of them tend to shut out facts which might with advantage to the course of justice be made known to the Court. However this may be, the Prize Court is not bound by such confining fetters as our municipal Courts. Upon this subject Dr. Lushington laid down the practice as follows:

“With regard to the evidence to be produced in the Admiralty Courts with respect to blockades, and indeed I may say all other questions of prize, I believe the practice to have been, not to entertain objections to the admissibility of the evidence offered, but to receive all that might be tendered; and certainly we have in this case the licence of evidence of every kind and description which could be well offered to the consideration of the Court.

“I apprehend that this, so far as I know, the universal practice of the Court was adopted for several reasons. First, because the Prize Court being, not a municipal Court, but a Court for the administration of public law, was not restrained, with regard to evidence, by those rules which are applicable to questions of municipal law.

“Secondly, it would be most difficult, even if possible, to have laid down any rules of evidence; because this Court, having to concern itself with the transactions of various nations, could never construct a code in conformity with all their various rules, and consequently injustice might be done by excluding in transactions in which they were interested, proofs recognised by themselves.

“Thirdly, because of the extreme difficulty of procuring what we are accustomed to call the best evidence, when such evidence is to be obtained from distant countries.

“Fourthly, because, though the Court may receive all, it will form its own judgment according to the circumstances of the case, of the weight to be attributed to each species of evidence, and is not supposed to be liable to the error of giving undue importance to any evidence, merely because it does not exclude it”—THE *FRANCISKA* [1855] (Spinks, 111, 137; 2 Eng. P.C. 346, 394).

I have stated the conclusions of fact to which I have come in the present case. The question now remains whether such a vessel is immune from capture as a coast fishing vessel.

The history, up to the year 1899, of the varying practices in this and other countries of exempting from capture in war vessels engaged in coast fishing, has been given in the Supreme Court of the United States of America in *THE PAQUETE HABANA*; *THE LOLA* [1900] (175 U.S. 677; 189 U.S. 453; *Pitt Cobbett's Leading Cases on International Law*, Part I. p. 1). The judgment of the Court was delivered by Mr. Justice Gray. It is full of research, learning, and historical interest.

As such an elaborate and complete *résumé* is available in that judgment, it would be a work of supererogation for me to attempt to perform a similar task. The conclusions stated by Mr. Justice Gray, which form the judgment of the majority of the Supreme Court (175 U.S., at p. 708), were as follows: "This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent States, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war. The exemption, of course, does not apply to coast fishermen or their vessels, if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way. Nor has the exemption been extended to ships or vessels employed on the high seas in taking whales or seals, or cod or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce. This rule of international law is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter."

Since the date when that judgment was pronounced the matter has been dealt with by Japan in its Prize Regulations, and in some of its Prize Court decisions, and it forms also the subject of one of The Hague Conventions of 1907.

Article 35 of the Japanese Regulations governing captures at sea, which came into force on March 15, 1904, provides as follows:

"All enemy vessels shall be captured. Vessels belonging to one of the following categories, however, shall be exempted from capture if it is clear that they are employed solely for the industry or undertaking for which they are intended:

"(1) Vessels employed for coast fishery.

"(2) Vessels making voyages for scientific, philanthropic, or religious purposes.

"(3) Lighthouse vessels and tenders.

"(4) Vessels employed for exchange of prisoners."

In the case of *THE MICHAEL* [1905] (*Russian and Japanese Prize Cases*, 1913, vol. 2, p. 80), heard in the Japanese Prize Court, which related to what was alleged to be a deep-sea fishing vessel, it was claimed that: "(5) The vessel, though a deep-sea fishing vessel, was not engaged in traffic forbidden in time of war, nor was she carrying contraband of war, and consequently being harmless should be released in accordance with the intention which underlies the exemption from capture of small coastal fishing boats." Upon this the decision of the Court ran as follows: "The claimants also argued that the vessel should be released in accordance with the intention underlying the exemption from capture of small coastal fishing boats, but the usage of International Law by which small coastal fishing boats are not captured arises mainly from the desire not to inflict distress upon poor people who are not connected with the war, and the principle cannot be extended to a vessel like the *Michael*, which was the property of a company, and engaged in deep-sea fishing."

The point was not raised in the Higher Prize (Appeal) Court. Similarly, in *THE ALEXANDER* [1905] (*Russian and Japanese Prize Cases*, vol. 2, p. 86) the same Court pronounced as follows: "It is also argued by the claimants that the vessel should be released in accordance with the intention underlying the exemption from capture of small coastal fishing vessels, but the usage of International Law by which small coastal fishing vessels are not captured arises mainly from the desire not to inflict distress on poor people who are not connected with the war, and clearly cannot be extended to a vessel like the *Alexander*,

the property of a company and, moreover, engaged in deep-sea fishing."

Upon appeal one of the grounds of appeal was: "Again, the reasoning in the decision appealed from, that as the exemption from capture of small coastal fishing vessels chiefly arose from a desire not to inflict distress upon poor people unconnected with the war, it could not therefore be extended to a vessel like the *Alexander*, which was engaged in deep-sea fishing, shews that the claimants' point had not been understood. What the claimants desired was that the Imperial Prize Court should, in the light of recent developments in International Law, not adhere to old usages, but create new precedents."

Upon which the Court adjudged in somewhat quaint fashion as follows: "The appellants also desired that a new precedent should be established in the light of recent developments of International Law by the exemption from capture of a vessel which, as in the present case, was engaged in deep-sea fishing. . . . The appellants' request that a new precedent should be created by the exemption from capture of a deep-sea fishing vessel is nothing more than the simple expression of their hopes, and the second ground of the appeal is therefore also devoid of substance."

I do not propose to make any pronouncement in the case now before the Court as to whether the German Empire or its citizens have in the circumstances of this war the right to claim the benefit of The Hague Conventions. But in order to shew how the doctrine with which I am now dealing has been treated by the nations with the progress of years and events, I refer to article 3 of Convention No. XI. of The Hague Conference, 1907, which is as follows:

"Vessels employed exclusively in coast fisheries, or small boats employed in local trade, together with their appliances, rigging, tackle, and cargo, are exempt from capture.

"This exemption no longer applies from the moment that they take any part whatever in hostilities.

"The contracting Powers bind themselves not to take advantage of the harmless character of the said vessels in order to use them for military purposes while preserving their peaceful appearance."

In this country I do not think any decided and reported case has treated the immunity of such vessels as a part or rule of the



law of nations—see *THE YOUNG JACOB AND JOHANNA* (1 C. Rob. 20) and *THE LIESBET VAN DEN TOLL* [1804] (5 C. Rob. 283; 1 Eng. P.C. 479). But after the lapse of a century, I am of opinion that it has become a sufficiently settled doctrine and practice of the law of nations that fishing vessels, plying their industry near or about the coast (not necessarily in territorial waters), in and by which the hardy people who man them gain their livelihood, are not properly subjects of capture in war so long as they confine themselves to the peaceful work which the industry properly involves. The foundation of the doctrine is stated in *Hall's International Law* (8th ed.), p. 446, as follows: "It is indisputable that coasting fishery is the sole means of livelihood of a very large number of families as inoffensive as cultivators of the soil or mechanics, and that the seizure of boats, while inflicting extreme hardship on their owners, is as a measure of general application wholly ineffective against the hostile state."

The rule is formulated by Westlake (*International Law*, Part II. "War," p. 155) in these terms:

"*Coast Fisheries.* Immunity from capture on the ground of their being enemies or enemy property, but not from capture and condemnation on the ground of breach of blockade, is enjoyed by the men, boats and tackle employed in coast fisheries, and their cargoes of fresh fish, including fish kept alive by contrivances on their way to market; so long as the men and boats are not engaged in any warlike employment—in which scouting, exchanging signals with the forces on their side, and carrying arms would be included—so long also as in the opinion of the hostile government or its naval commanders concerned they are not likely to be engaged in any warlike employment."

And he adds: "If the opinion here referred to is only that of the naval commanders concerned, the prize court before which the captures are brought will have to release them unless the warlike intention of the captured is proved to its satisfaction; but if the captures were made in pursuance of a government order, the prize court, in the absence of anything to the contrary in the constitution of the country, will be bound by such an order as emanating from the authority under which it sits."

It is obvious that, in the process of naval warfare in the present day, such vessels may, without difficulty and with great secrecy, be used in various ways to help the enemy. If they

are, the immunity would disappear and it would be open to the naval authorities under the Crown to exclude from such immunity all similar vessels, if there was reason for believing that some of them were utilised for aiding the enemy. And this seems to be the sense in which the second paragraph of article 3 of The Hague Convention referred to should be regarded.

As to the *Berlin*, I am of opinion that she is not within the category of coast fishing vessels entitled to freedom from capture; on the contrary, I hold that, by reason of her size, equipment, and voyage, she was a deep-sea fishing vessel engaged in a commercial enterprise which formed part of the trade of the enemy country, and as such could be and was properly captured as prize of war. I therefore decree the condemnation of the vessel and cargo, and order the sale thereof.

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*Solicitor*—Treasury Solicitor.

[Reported by Arthur Pritchard, Esq., Barrister-at-Law.]

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[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). Sept. 11, 16, 1914.

THE MARIE GLAESER.

*Prize Court—Enemy Vessel—Owners—Enemy Limited Company—Appearance in Prize Court—Shareholders—Claimants for Disbursements and Services—Bounty of Crown—Mortgagees—Capture at Sea—"Ignorant of the outbreak of hostilities"—Second Hague Peace Conference, 1907, Convention VI. art. 3.*

*A German merchant steamship, owned by a German limited company resident in Germany, left a British port some hours before war commenced between this country and Germany, and was captured at sea while still ignorant of the outbreak of hostilities. Article 3 of Convention VI. of the Second Hague Peace Conference, 1907, provides that enemy merchant ships which left their last port of departure before the commencement of the war, and are encountered on the high seas while still ignorant of the outbreak of hostilities, may not be confiscated,*

but are merely liable to be detained, &c. This Convention was signed by Great Britain, but, when signed by Germany, article 3 was reserved. As regards this vessel—first, on behalf of the Crown, a decree of condemnation as prize was claimed; secondly, on behalf of the owners, it was contended that they were entitled to appear against this claim in the Prize Court, though the affidavit filed on their behalf did not shew any special circumstances entitling them to appear; thirdly, on behalf of certain shareholders in the vessel, and other claimants who had paid disbursements or rendered services in respect of the vessel, it was contended that they had some rights in the Prize Court in respect of the vessel; fourthly, on behalf of neutral mortgagees of the vessel, it was contended that the amount due under the mortgage should be paid out of the proceeds of the vessel when sold:—Held, first, that article 3 of the said Convention VI. did not apply in the circumstances, and that the vessel must be condemned as prize and not merely detained; secondly, that the German owners had no right to appear in the Prize Court, as no special circumstances were shewn entitling them to appear; thirdly, that the shareholders, and claimants in respect of disbursements, &c., had no rights in the Prize Court in respect of the vessel, but could only apply to the bounty of the Crown; and fourthly, after a full review of the authorities, that the claim of the mortgagees must be rejected.

Claim for condemnation of ship as prize.

The German steamship *Marie Glaeser* (Albert Schroder, master), 1,317 tons gross, of the port of Rostock in Germany, owned by a German company of Rostock with limited liability, bound from Bristol to Archangel in ballast, left Bristol on August 1, 1914, and put into Barry on August 4. She left the same day before 11 P.M., when war was declared as existing between Great Britain and Germany; and on August 5, while still ignorant of the outbreak of hostilities, she was captured at sea by His Majesty's cruiser *Gibraltar*, and was sent in with a prize crew on board to Glasgow. A writ was issued by the Procurator-General, claiming condemnation of the ship as prize.

Article 3 of Convention VI. of the Second Hague Peace Conference, 1907, is as follows: "Enemy merchant-ships which left their last port of departure before the commencement of

the war, and are encountered on the high seas while still ignorant of the outbreak of hostilities may not be confiscated. They are merely liable to be detained on condition that they are restored after the war without payment of compensation; . . .” Great Britain signed this Convention; but Germany signed it under reservation of article 3 and paragraph 2 of article 4.

Appearances had been entered on behalf of various firms and others, as follows: First, the German company, claiming as owners of the ship; secondly, various shareholders in the vessel—namely, J. Fry & Co., and Albert Glaeser, of Woking, and Cennynck; thirdly, De Eerste Nederlandsche Scheepsverband Maatschappij, of Dordrecht, in Holland, mortgagees; fourthly, H. G. Harper & Co., claiming for disbursements and brokerage; and Harper, Seed & Co., Lim., of Newcastle, claiming for brokerage and disbursements; and A. Lutze & Co., claiming for necessities.

An affidavit had been filed on behalf of the owners, but it did not shew any special circumstances which would entitle them to appear.

*The Solicitor-General (Sir Stanley Buckmaster, K.C.) and Ricketts, for the Crown.*—The German Empire having refused adherence to article 3, the owners of the vessel cannot avail themselves of it. As regards the shareholders, their rights in a vessel under an enemy flag are not to be considered—THE PRIMUS [1854] (Spinks, 48; 2 Eng. P.C. 290). The Crown, however, had always power to make concessions if it thought right.

[SIR SAMUEL EVANS (THE PRESIDENT).—Are these shareholders in fact British subjects?]

If it becomes necessary to enquire into their true position, an enquiry for that purpose would have to be directed, because it is plain from the statements made that some of them at least are not British. As regards the mortgagees, no such claim as theirs has ever been recognised in the Prize Court, and mortgagees are in a similar position to a bottomry bondholder. In THE TOBAGO [1804] (5 C. Rob. 218; 1 Eng. P.C. 456) a claim on behalf of British subjects, holders of a bottomry bond, was rejected as an attempt to carve a subsidiary interest out of a vessel which ran under the protection of an enemy flag. The question is, Who owned the vessel? Was she under the

enemy flag or not? If the other view were taken, the result might be that a vessel under the enemy flag could not be captured, because the whole of the interest in it was held by mortgagees. As regards the necessities and disbursements, no such claim could be enforced in the Prize Court, but expenses may be granted to these claimants by the bounty of the Crown—*THE VROW SARAH* [1803] (1 Dodson, 355*n.*; 2 Eng. P.C. 185*n.*). That, of course, would involve a careful investigation of the circumstances and the character of the persons putting the claims forward.

*Lewis Noad*, for the owners, the British shareholders, and certain claimants who had paid disbursements and rendered services on account of the vessel.—There had been great difficulty in getting proper evidence to put before the Court. These claimants had endeavoured to get an adjournment, without success. If the Crown should only ask for detention, all that the interests which he represented would seek was that their claims should be held in abeyance while the vessel was detained.

[*SIR SAMUEL EVANS* (THE PRESIDENT).—As regards the owners, before you are entitled to ask for anything, you must shew that you are entitled to be here.]

It must be admitted that the affidavit on behalf of the owners is faulty, and, as no instructions can be obtained, it cannot be amended. But an alien enemy is entitled to appear in the Prize Court—*THE FENIX* [1854] (Spinks, 1; 2 Eng. P.C. 238).

[*SIR SAMUEL EVANS* (THE PRESIDENT).—That case is against you.]

[*The Solicitor-General* (*Sir Stanley Buckmaster, K.C.*).—It is plain that an alien enemy has no right to appear.]

As regards the claims for necessities and disbursements, it is submitted that the Court should order a reference to the Registrar. Some of the claimants are British subjects.

[*The Solicitor-General* (*Sir Stanley Buckmaster, K.C.*).—These claimants should furnish to the Crown a statement of the expenditure which they allege they have incurred, proof that it has been incurred, and that the items of expenditure are such that the Crown can allow, and that the expenditure has been incurred by British subjects. No doubt the Crown will consider such claims indulgently.]

*Leslie Scott, K.C.*, and *L. F. C. Darby*, for the mortgagees.—The mortgagees are a Dutch firm, and therefore neutrals. The

question as to their rights is of great importance, as this is the first case of the kind in the present war. The mortgage purports to have been made in 1905 for a large sum of money, under terms which provided for the liquidation of the loan by annual instalments. This was a valid German mortgage.

[SIR SAMUEL EVANS (THE PRESIDENT).—How can I determine that?]

It depends on German law, which can be proved by evidence. The case of a bottomry bondholder, as in *THE TOBAGO* (5 C. Rob. 218; 1 Eng. P.C. 456), is quite different. The mortgagees had a right to property. The law has proceeded further than in Lord Stowell's time in recognising the property of neutrals. Modern international usage and law represent rules of executive policy, and the Prize Court should apply these rules in dealing with property.

*The Solicitor-General* (Sir Stanley Buckmaster, K.C.), in reply.—As regards the claimants for necessities and disbursements, if full particulars are given and the Crown is satisfied of their *bona fides* and British nationality they will get what they ought to have; but it may be right that they should have liberty to apply to the Court. The Court should not, it is submitted, order a reference of these claims to the Registrar. As regards the mortgage there is no reference to it in the ship's papers, and even if there were it would not affect the principle that the Court will not take cognisance of private arrangements with an enemy owner—*THE ARIEL* [1857] (11 Moore P.C. 119; 2 Eng. P.C. 600), *THE AINA* (No. 1) [1854] (Spinks, 8; 2 Eng. P.C. 247), *THE HAMPTON* [1866] (5 Wall. (Amer.) 372), *THE BATTLE* [1867] (6 Wall. (Amer.) 498), and *THE CARLOS F. ROSES* [1900] (177 U.S. Rep. 655). A mortgage on a ship sailing under the enemy's flag is treated as a part interest in the ship, and is not saved from the condemnation—*Westlake, International Law*, Part II. "War" (ed. 1913), pp. 169, 170.

SIR SAMUEL EVANS (THE PRESIDENT).—This vessel is clearly, according to the ship's papers, a German vessel, under a German master, with a German crew, and flying the German flag. She was captured at sea on August 5. A declaration was made that a state of war existed between this country and Germany as from 11 P.M. on August 4. This vessel had left Barry previously, and it is admitted that at the time of capture she

was not aware that hostilities had broken out. The question, whether and how far the provisions of the Conventions of the Second Hague Peace Conference, 1907, are binding upon this Court, is one which is still undecided, but which will no doubt have to be decided in the near future. But it is not necessary to have regard to Convention VI. in this case; even if article 3 of that Convention could have applied, Germany did not agree to it, but reserved her signature to it, and therefore cannot be entitled to any benefit under it. The vessel therefore is a fit subject for condemnation, and there will be a decree for condemnation, and appraisal and sale by the Marshal. Various claims have been put forward, and I will deal with them in the order in which they have been submitted. In the first place an appearance has been entered at the request of a gentleman who said he acted as agent for the owners of the vessel. Now it is admitted that the owners of the vessel are German subjects. The affidavit in this case partakes of the same character as the affidavit in *THE CHILE* (*ante*, p. 1). It is wholly insufficient, as it does not shew or tend to shew any circumstances which entitle an enemy owner of a ship to appear in this Court. According to Order III. rule 5 of the Prize Court Rules, 1914, an alien enemy shall, before entering an appearance, file in the Registry an affidavit stating the grounds of his claim. That does not mean an affidavit merely stating his contentions, but one shewing facts which in the special circumstances will entitle him to come to the Court to enter an appearance.

In *THE PANAJA DRAPANIOTISA* [1856] (Spinks, 336; 2 Eng. P.C. 560) a claimant prayed the Court for time to admit further proof in explanation of the real facts, but the Queen's Advocate opposed the prayer, and contended for immediate condemnation. Dr. Lushington said: "The principle is this: that to support a claim in the Prize Court the individual asserting his claim must first shew that he is entitled to a *locus standi*. No person to whom the character of enemy attaches can have such claim, save by the express authority of the Crown; therefore, to prevent deception, which might arise from the use of ambiguous terms, and to stop claims which might be preferred in one sense by the subjects of friendly or neutral states resident in the enemy's country and carrying on a trade there, it has always been deemed necessary that the claimant should describe, both affirmatively and negatively, the character in which he claims."

Certain forms of affidavit, which were then in use, are set out in the judgment in that case, and though those forms of affidavit are no longer in use in this country, the affidavits which lead to the filing or the entering of an appearance in prize cases in this Court ought to conform to the substance of the affidavits which were in vogue in 1856. They ought to state clearly what the position of the owner of the vessel is, what his nationality is; and, if it appears that he is an alien enemy, in the ordinary course the circumstances ought to be stated in the affidavit, shewing upon what grounds he claims to be standing in some character other than that of an alien enemy for the purpose of being heard in this Court. A case where there were special circumstances was *THE FELICITY* [1819] (2 Dodson, 381, at p. 386; 2 Eng. P.C. 233, at p. 236), where Lord Stowell said, "In the present case it is contended that the hostile character was disarmed by a licence, and I see no reason to dispute either the existence of the licence, or its authority." In *THE TROIJA* [1854] (1 Spinks, E. & A. 342), Dr. Lushington said, "I entertain no doubt as to the correct practice in such cases; it is, that when an enemy claims he must show a *persona standi in judicio*, the law being that an alien enemy is not entitled in any way to sue in this or any other Court." Lord Stowell made similar observations in *THE HOOP* [1799] (1 C. Rob. 196, at p. 200; 1 Eng. P.C. 104, at p. 107): "In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain in the language of the civilians a *persona standi in judicio*. The peculiar law of our own country applies this principle with great rigour. The same principle is received in our Courts of the law of nations. They are so far British Courts that no man can sue therein who is a subject of the enemy, unless under particular circumstances that *pro hac vice* discharge him from the character of an enemy, such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hac vice*. But otherwise he is totally *ex lege*."

And Mr. Justice Story, *Notes on the Principles and Practice of Prize Courts*, p. 21, says, "Nor can an enemy interpose a claim, unless under the protection of a flag of truce, a cartel, licence, pass, treaty, or some other act of the public authority suspending his hostile character."



In this case there is nothing in the affidavit which tends to shew that the hostile character of the owners of the vessel is suspended in any way, nor is there any suggestion made by those who claim to appear that there is anything in the nature of a licence to trade, or any circumstances whatever differentiating this alien enemy from any other enemy who might be affected by a judgment of the Prize Court. Therefore, on the ground of the insufficiency of the affidavit, and on the ground that there are no special circumstances which can be shewn to entitle the enemy to appear, I hold that the appearance ought not to stand, and it will be struck out.

Other claims were made on behalf of shareholders, mortgagees, and those who have made disbursements or rendered services. As regards the shareholders, if they are enemy shareholders their property must go with the capture of the vessel in which they have put their money. Not only is that so with regard to shareholders who are citizens of the German Empire, but it is equally so if they belonged to this country. If a shareholder invests his money in taking shares in a vessel which is liable to capture he takes that risk. In the case of a British shareholder, if he presents his case to the Crown for lenient treatment under the exercise of the prerogative of bounty, that is another matter. I have nothing to do with that. I am here merely to administer the law.

What I have said as to the shareholders applies perhaps with greater force to those who have advanced sums of money, or rendered services, such as brokerage. As Judge of the Prize Court, I cannot allow such claims. There is no reason to believe that the Crown will act with less generosity than in former times, and, as the Solicitor-General has intimated, if such claims are put forward by British subjects, and if they are proved to be *bona fide*, no doubt they will be fairly considered.

With regard to the claim of the mortgagees, their counsel have argued that there is no decision in this Court by my predecessors against a claim put forward by mortgagees. In deference to this argument, and as the matter affects, no doubt, many people in this country and abroad, although I have little doubt what my judgment will be, I will look further into the matter before I pronounce judgment.

I pronounce that this vessel was properly seized as prize and subject to condemnation, and accordingly I condemn her and order her to be sold.

The Crown was given liberty to apply. Judgment was reserved as to the claim of the mortgagees.

Sept. 16, 1914.—SIR SAMUEL EVANS (THE PRESIDENT).—This merchant vessel, belonging to enemy owners, was captured at sea on August 5 last by H.M. cruiser *Gibraltar*, and has already been condemned by the Court as lawful prize. She was a German vessel, registered at the port of Rostock, owned by a German limited company, commanded by a German master, and flying the German flag.

A claim has been made on behalf of certain mortgagees, who are neutrals—a limited liability company in Holland. Counsel who appeared for them did not contest the legality of the capture of the vessel, nor oppose the judgment of condemnation. The claim he put forward was that a sufficient sum out of the proceeds of sale of the prize should be set aside to satisfy the amount which might be found due to the mortgagees, on the ground that they were, as neutrals, entitled to have their property or interests protected. He contended—first, that no case in the English Prize Court had dealt with the claim of a neutral mortgagee in a sense adverse to the claim now put forward; secondly, that the decisions in our Prize Courts touching liens—for instance, *THE TOBAGO* (5 C. Rob. 218; 1 Eng. P.C. 456)—were not applicable to the cases of mortgages, on the ground that some kind of “property” in the ship passed to and vested in mortgagees; and thirdly, that in any event at the present day the International Law of Prize should be extended and applied so as to protect mortgages held by neutrals in accordance with what he contended was the policy and principle upon which the Declaration of Paris was founded.

As I intimated at the conclusion of the argument last week, I did not feel much doubt as to what the judgment of the Court ought to be; but as the question arose in many other cases of neutrals, and in similar cases of British subjects also, and particularly as the Court was asked to enunciate what appeared to be new law, judgment was reserved for maturer consideration.

It will be convenient first to set out a few facts as to the mortgage. It was executed on June 26, 1905, by Otto Zelck (a subject of the German Empire) as manager of the German limited liability company known as the Steamship Company Marie Glaeser, in Rostock, in favour of a Dutch company called Eerste Nederlandsche Scheepsverband Maatschappij in Dordrecht, Holland, on certain conditions for a loan of 172,500 marks. The operative part of the mortgage was in these terms (translated): "I grant by these presents to the Dutch company a mortgage on the steamer *Marie Glaeser*, registered in the ship's register in Rostock, amounting to 172,500 marks German currency."

The repayment with interest was spread over a term extending up to December, 1917; but in certain events the whole was made repayable immediately. Among the conditions were the following:

"3. Moreover the Dutch company will be authorized without any further formality to insure the vessel against imminent risk of war for the account of the mortgagor (borrower) at the utmost for the double of the moneys which have been advanced to the mortgagor (borrower), should the mortgagee (lender) be of opinion that such a risk is really imminent. . . ."

"5. The moneys which have been paid off (reimbursed) are either to be fully extinguished on the object of the loan or the priority must be secured to the mortgagee (lender) for the remainder of his claim above (before) the amount of the claim that has been paid off (reimbursed), even though therefore subrogation in favour of a third party should have taken place; if not, the Dutch company is authorized to claim without delay and any notice the reimbursement of the loan which has been granted, together with all accrued interests and expenses. . . ."

"6. The Dutch company will be authorized to claim without delay and any notice the reimbursement of the loan, together with the accrued interests and expenses:—

I. Should the vessel get lost or be condemned. . . .

III. Should the vessel be alienated entirely or partly, or should the ship business be stopped. In the event of alienation, should the transfer (transmission) of the debt unto the acquirer not have taken place with the authorization of the Dutch company, the mortgagor (borrower) has to pay to the Dutch company, besides the loan together with

the accrued interests, a commission for renunciation, amounting to 1 per cent. (one per cent.). The mortgagor (borrower) is bound to inform the mortgagee (lender) without delay of every transaction by which the property of the mortgaged vessel is transferred (transmitted) entirely or partly to another party or other parties. . . .

VI. In the event under I. the Dutch company is authorized to endeavour to make good her claim from the insurance policies, save her personal claims against the mortgagor (borrower) respectively his assigns. In the cases under II. to VI. the Dutch company is authorized, without the serving of a writ being previously required, to endeavour to enforce her claims on the vessel and her appurtenances. The mortgagor (borrower) remains by all means personally responsible towards the Dutch company for an eventual unexpected loss."

"8. All disputes arising between the mortgagor (borrower) and the Dutch company are to be submitted to the competent Court of Justice of Hamburg."

It is stated in the affidavit in support of the claim that the amount remaining due was 69,000 marks. The mortgage was duly entered in the ship's register in Rostock.

It is not disputed that the mortgage represented an honest business transaction. The mortgagors remained, and were at the capture, in possession of the vessel. No reference to the mortgage was entered upon any of the ship's papers.

With regard to the first two contentions of counsel for the claimants, even if there were no decision of our Prize Courts dealing with the claim of a mortgagee, a principle ought to be deducible, and in truth can clearly be deduced, from cases dealing with liens upon, or claims in respect of, captured vessels, the application of which should be decisive of the case now before the Court.

But it is not quite accurate to say that our Prize Courts have never adjudicated upon claims of a neutral mortgagee.

In *THE AINA* (No. 1) (Spinks, 8; 2 Eng. P.C. 247) a claim was made by a person alleged to be a neutral who was mortgagee of one-third part of a captured enemy ship. Two questions there arose: First, whether the claimant was a neutral; and secondly, whether, supposing him to be a neutral, he would be entitled to come to the Prize Court and claim

one-third of the ship by virtue of the mortgage. It is true, that the Court decided that the claimant was not a neutral, and that was enough to support the decision. But the Court also unequivocally stated that, even if he were a neutral, his claim could not be sustained. Dr. Lushington said, "If I am to do it in the present case, innumerable questions would arise, and the Court might be called upon to inquire into the validity of the mortgage, and be compelled to determine that validity, not by the law of England, but by the law of the country where it was executed."

With regard to the authorities generally, the first and leading case usually referred to is *THE TOBAGO* (5 C. Rob. 218; 1 Eng. P.C. 456). Counsel for the claimant sought to distinguish that case, and even invoked the aid of certain passages or phrases in the judgment.

The claimant in that case was a British subject; the claim was founded upon a bottomry bond on a French vessel executed by her master to the claimant before hostilities between Great Britain and France had commenced. The claim was rejected upon the broad ground that the Court recognised no liens upon a captured vessel, with the special exception of some liens attaching by the general law of the mercantile world independently of contract. Lord Stowell in his judgment says: "It is a case of a bottomry bond given fairly in time of peace, without any view of infringing the rights of war, to relieve a ship in distress—a contract certainly regarded with great attention and tenderness by this Court when brought immediately before it. But can the Court recognize bonds of this kind as titles of property, so as to give persons a right to stand in judgment and demand restitution of such interests in a Court of Prize? The total silence of those who have argued for the claimant as to any precedents for this demand, strongly shows that it has not been the practice of the Court to consider such bonds as property entitled to its protection; and I think I may venture to say that there has been no such instance. The person advancing money on bonds of this nature acquires by that act no property in the vessel; he acquires the *jus in rem*, but not the *jus in re*, until it has been converted and appropriated by the final process of a Court of Justice. The property of the vessel continues in the former proprietor, who has given a right of action against it, but nothing more. If there is no

change of property, there can be no change of national character. Those lending money on such security take this security subject to all the chances incident to it, and, amongst the rest, the chances of war."

It may be observed in passing that by the mortgage in the case now before the Court the risk of war was expressly mentioned, and the mortgagees had the right at the expense of the mortgagors to insure against it, if they thought war was imminent.

Then Lord Stowell, having dealt with the exceptional cases of "an interest directly and visibly residing in the substance of the thing itself" (as freight on cargo), proceeds: "But it is a proposition of a much wider extent which affirms that a mere right of action is entitled to the same favourable consideration in its transfer from the neutral to a captor. It is very obvious that claims of such a nature may be so framed as that no powers belonging to this Court can enable it to examine them with effect. They are private contracts passing between parties who may have an interest in colluding; the captor has no access whatever to the original private understanding of the parties in forming such contracts, and it is therefore unfit that he should be affected by them. His rights of capture act upon the property, without regard to secret liens possessed by third parties. In like manner his rights operate on no such liens where the property itself is protected from capture; indeed it would be almost impossible for the captor to discover such liens in the possession of the enemy upon property belonging to a neutral. The consequence, therefore, of allowing generally the privilege here claimed would be that the captor would be subject to the disadvantage of having neutral liens set up to defeat his claims upon hostile property, whilst he could never entitle himself to any advantage from hostile liens upon neutral property. This Court therefore excludes all consideration of liens or incumbrances of this species. On the whole, I am of opinion that there is no instance in which the Court has recognized bonds of this kind as titles of property, and that they are not entitled to be recognized as such in the Prize Court, however much the Court of Admiralty may be disposed to uphold them in the other branch of its jurisdiction when they are brought directly before it."

The passages above quoted were expressly adopted by the Privy Council in 1857, in *THE ARIEL* (11 Moore P.C. 110;

2 Eng. P.C. 600); and the substance of the decision in this last case is succinctly stated towards the end of the judgment delivered by Sir John Patteson as follows: "liens, whether in favour of a neutral on an enemy's ship, or in favour of an enemy on a neutral ship, are equally to be disregarded in a Court of Prize."

It was contended that a claim under a mortgage was in some essential respects different from that under a bottomry bond. It is difficult to see in what respects, so far as regards the functions of a Prize Court.

It may be noted that by the municipal law of this country the claims of a mortgagee, whether in possession or not, ranks below the claims of persons who have maritime liens on the mortgaged ship—for example, for bottomry, salvage, and wages—see *THE DUKE OF BEDFORD* [1829] (2 Hag. Adm. 294), *THE BOLD BUCCLEUGH* [1851] (7 Moore P.C. 267, 284), *THE MARY ANN* [1865] (35 L. J. Adm. 6; L. R. 1 A. & E. 8), *THE FERONIA* [1868] (37 L. J. Adm. 60; L. R. 2 A. & E. 65), and *THE RIPON CITY* [1897] (66 L. J. P. 110, at p. 119; [1897] P. 226, at p. 243).

So if the mortgagees of the *Marie Glaeser* had been British subjects, and the effect of the mortgage depended on British law, *THE TOBAGO* (5 C. Rob. 218; 1 Eng. P.C. 456) would be an authority *a fortiori* against their claim.

As to the contention that the mortgagees in the present case had, by virtue of the mortgage, some kind of "property" in the *Marie Glaeser*, no information was given to the Court as to the exact meaning of the word "property" so used, or as to its nature, or whether it imputed some kind of "ownership" of the vessel. By our own statute law, except so far as may be necessary for making a mortgaged ship available as a security for the mortgage debt, the mortgagee shall not, by reason of the mortgage, be deemed the owner of the ship, nor shall the mortgagor be deemed to have ceased to be the owner thereof—Merchant Shipping Act, 1894, s. 34.

Whether the German law as to mortgages substantially differs from ours, or what the German law on the subject may be, this Court declines to enquire. To do so is no part of the duty of a Court of Prize. The difficulties and delays of embarking upon any such enquiries have always been given

by Prize Courts as reasons for not entertaining any claims for liens or charges on captured ships.

In *THE MARIANNA* [1805] (6 C. Rob. 24; 1 Eng. P.C. 518), which was a claim by a neutral on a lien for unpaid purchase money, Lord Stowell said: "Captors are supposed to lay their hands on the gross tangible property, on which there may be many just claims outstanding between other parties which can have no operation as to them. If such a rule did not exist it would be quite impossible for captors to know upon what grounds they were proceeding to make any seizure. The fairest and most credible documents, declaring the property to belong to the enemy, would only serve to mislead them if such documents were liable to be overruled by liens which could not in any manner come to their knowledge. It would be equally impossible for the Court which has to decide upon the question of property to admit such considerations. The doctrine of liens depends very much on the particular rules of jurisprudence which prevail in different countries. To decide judicially on such claims would require of the Court a perfect knowledge of the law of covenant, and the application of that law in all countries, under all the diversities in which that law exists. From necessity, therefore, the Court would be obliged to shut the door against such discussions, and to decide on the simple title of property with scarcely any exceptions."

It is not profitable to guess at the effect of the German mortgage deed; but there is certainly nothing upon the face of it which indicates any transfer of ownership, or anything other than a charge for the mortgage debt. Portions of the conditions before set out seem to negative anything of the kind; and how are captors at sea, or the Prize Courts on land, to solve puzzles and perplexities which might arise from the condition that, "All disputes arising between the mortgagor (borrower) and the Dutch company are to be submitted to the competent Court of Justice of Hamburg?"

The fact has been stated that no reference to the mortgage is to be found in any of the ship's papers; and, so far as I am aware, no notice of any information as to the mortgage was given to the captors, or any one interested in the capture, till the claim was put in in the proceedings. But these facts are not material.



The truth is that capture of enemy vessels at sea during war would be a hazardous and almost worthless right of belligerents, if the captors were confronted with such claims as are put forward in this case, or if mortgages gave to mortgagees prior rights to those of the captors.

But counsel for the claimants, as his last resource, boldly pressed the Court to extend the law at the present day, so as to protect neutral mortgagees of enemy ships, on the ground that the law of nations has advanced, as he contends, in this direction, by and since the Declaration of Paris, 1856; and that such a protection is necessary to accord with the policy and spirit of the Declaration with regard to neutrals.

It is advisable to glance briefly at the way the Declaration has been dealt with by the nations. Before the Declaration of Paris the treatment of enemy goods under a neutral flag, and neutral goods under the enemy's flag, which was afterwards embodied in the second and third rules of the Declaration, was agreed to and observed by France and this country during the Crimean War. The Declaration itself—the terms of which “are not strictly authoritative law” (*Hall's International Law* (6th ed.), p. 686)—has been adopted by practically all the civilised States of the world except the United States of America.

The United States refused to become a party to it chiefly on the broad ground that they desired a complete exemption from capture at sea of all private property. Nevertheless the United States announced at the beginning of the Civil War that they would give effect to its principles during those hostilities; and again in 1898, during their war with Spain, the President issued a proclamation on April 26, 1898, declaring that the policy of the United States Government in the conduct of the war would be to adhere to the rules of the Declaration of Paris therein set forth, one of them being thus expressed: “Neutral goods not contraband of war are not liable to confiscation under the enemy's flag.”

Spain also, in the same year, while maintaining that she was not bound by the Declaration, gave orders for the observation of the rules that—first, a neutral flag covers the enemy goods, except contraband of war; and secondly, neutral goods, except contraband of war, are not liable to confiscation under the enemy's flag—*Hertslet, Commercial Treaties*, XXI. 837.

Spain and Mexico, which had for half a century refrained from acceding to it, have recently formally acceded, the former State on January 18, 1908, and the latter on February 13, 1909.

Our own country, one of the original parties to it, has steadfastly adhered to it.

This Court accordingly ought to, and will, regard the Declaration of Paris, not only in the light of rules binding in the conduct of war, but as a recognised and acknowledged part of the law of nations, which alone is the law which this Court has to administer.

But how can it be used or applied so as to support the claimant's case? This Court can only enunciate what it conceives to be the law of nations. If any matter of International Law in controversy between nations requires to be settled by international convention, this Court cannot antecedently declare the controverted doctrine to be a part of International Law.

The Declaration of Paris, in the two rules referred to, only dealt with goods or merchandise carried in vessels, and not with the vessels themselves. If it had been intended to deal with vessels, and property, rights, or interests in them, that would have been expressed. The object was to insure the maintenance of maritime commerce by making certain goods carried over the seas immune from confiscation.

The lending of money upon vessels, or "financing" their owners, are business transactions which may be usual, necessary, and profitable. But they cannot with propriety be put upon the same footing in International Law as the commerce which constitutes the world-wide trade of the carriage of merchandise by sea. There does not appear to be any direct relation in principle between guarding the safety of this commerce upon its course across the oceans in the common interests of the nations, and giving protection by special rules of International Law to persons or companies who invest their moneys in shipping ventures.

Apart, therefore, from any assistance which may be derived from the decisions of various Prize Courts since the date of the Declaration, this Court could not accede to the suggestion that neutral mortgagees of vessels should have a rule of law created for their protection.

But have any decisions in any Prize Court since 1856 proceeded in the direction urged? Has any Court of Prize since

assented to such a claim as is now being made? The answer, it is believed, is in the negative.

On the contrary, there have been decisions against such claims. In 1866 the Supreme Court of the United States of America decided in *THE HAMPTON* (5 Wall. (Amer.) 372) that "In proceedings in prize, and under principles of international law, mortgages on vessels captured *jure belli*, are to be treated only as liens, subject to being overridden by the capture, not as *jura in re*, capable of an enforcement superior to the claims of the captors"—see headnote.

The claimant there was "a loyal citizen," and the *bona fides* of his mortgage was not disputed. His claim was to have the amount of his mortgage paid to him out of the proceeds of the sale of the captured vessel. Mr. Justice Miller, in delivering the opinion of the Supreme Court, said: "The first ground on which the appellant relies is, that the mortgage being a *jus in re*, held by an innocent party, is something more than a mere lien, and is protected by the law of nations. The mortgagee was not in possession in this case, and the real owner who was in possession admits that his vessel was *in delicto* by failing to set up any claim for her. It would require pretty strong authority to induce us to import into the prize courts the strict common law doctrine, which is sometimes applied to the relation of a mortgagee to the property mortgaged. It is certainly much more in accordance with the liberal principles which govern admiralty courts to treat mortgages as the equity courts treat them, as mere securities for the debt for which they are given, and therefore no more than a lien on the property conveyed. But it is unnecessary to examine this question minutely, because an obvious principle of necessity must forbid a prize court from recognizing the doctrine here contended for. If it were once admitted in these courts, there would be an end of all prize condemnations. As soon as a war was threatened, the owners of vessels and cargoes which might be so situated as to be subject to capture, would only have to raise a sufficient sum of money on them, by *bona fide* mortgages, to indemnify them in case of such capture. If the vessel or cargo was seized, the owner need not appear, because he would be indifferent, having the value of his property in his hands already. The mortgagee having an honest mortgage which he could establish in a court of prize would, either have the property

restored to him, or get the amount of his mortgage out of the proceeds of the sale. The only risk run by enemy vessels or cargoes on the high seas, or by neutrals engaged in an effort to break a blockade, would be the costs and expenses of capture and condemnation, a risk too unimportant to be of any value to a belligerent in reducing his opponent to terms. A principle which thus abolishes the entire value of prize capture on the high seas, and deprives blockades of all dangers to parties disposed to break them, cannot be recognized as a rule of prize courts. . . . There seems to be no reason to doubt the loyalty of the appellant or the fairness of his debt, and we regret our inability to provide for his claim. But until international treaties, or an act of Congress, shall mark another stage in the meliorations of the rigors of war, we are not at liberty to interpolate a principle which would tend so materially to destroy the right of prize capture in time of war."

So in 1867 in *THE BATTLE* (6 Wall. (Amer.) 498), also in the Supreme Court of the United States of America, Mr. Justice Nelson, in delivering the judgment, said, "The principle is too well settled that capture as prize of war, *jure belli*, overrides all previous liens, to require examination." And in the case previously cited, mortgages were treated as liens.

In 1870, in the Prize Court of France, a claim was made by Hoffman & Co., British shipowners, who had a mortgage upon a Prussian ship, *Der Turner*, that a sum to discharge the mortgage should be set aside from the proceeds of sale. It was there suggested that the claim might be allowed "by analogy and in accordance with the principles established by the Paris Conference that neutral property under an enemy flag is not subject to capture." But the decision was against the claim. It is summarised in these words: "La propriété du navire, au point de vue de l'exercice des droits de la guerre, est indivisible. L'hypothèque consentie sur un navire d'après les lois allemandes ne donne pas au créancier, sujet neutre, le droit de réclamer le bénéfice de la déclaration du Congrès de Paris."

In the course of the judgment, the Court said: "Mais, attendu que la propriété du navire, au point de vue de l'exercice du droit de guerre, est absolument indivisible; que ce principe est admis d'une façon constante par les tribunaux maritimes

de tous les peuples de l'Europe, et notamment par la Cour de l'Amirauté anglaise; qu'ainsi le sujet neutre, co-propriétaire d'un navire naviguant sous pavillon ennemi et ayant droit à porter ce pavillon, ne peut, si ce navire est capturé, revendiquer contre le capteur sa part de co-propriété; qu'en supposant même que l'hypothèque, permise par la loi prussienne sur la navire pût être, comme l'hypothèque constituée par les lois françaises, considérée comme un démembrement de la propriété, cette hypothèque ne pourrait apporter aucun obstacle à l'exercice absolu du droit de la guerre; que la première réclamation des sieurs Hoffman et Cie. doit donc être rejetée"—*Barboux, Jurisprudence du Conseil de Prises, 1870-1871* (Paris, 1872), p. 76.

In 1900, again, the Supreme Court of the United States of America in *THE CARLOS F. ROSES* (177 U.S. Rep. 655) dealt with the subject exhaustively in a claim put forward by a British company which had advanced money upon a cargo on a captured ship, and which had received bills of lading covering the shipments. Chief Justice Fuller, in delivering the judgment of the Court, said at page 666: "The right of capture acts on the proprietary interest of the thing captured at the time of the capture and is not affected by the secret liens or private engagements of the parties. Hence the prize courts have rejected in its favor the lien of bottomry bonds, of mortgages, for supplies, and of bills of lading."

He also cited with approval the following passage from *THE FRANCES* [1814] (8 Cranch (Amer.), 418, 419): "The doctrine of liens seems to depend chiefly upon the rules of jurisprudence established in different countries. There is no doubt but that, agreeably to the principles of the common law of England, a factor has a lien upon the goods of his principal in his possession, for the balance of account due to him; and so has a consignee for advances made by him to the consignor. . . . But this doctrine is unknown in prize courts, unless in very peculiar cases, where the lien is imposed by a general law of the mercantile world, independent of any contract between the parties. Such is the case of freight upon enemies' goods seized in the vessel of a friend, which is always decreed to the owner of the vessel. . . . But in cases of liens created by the mere private contract of individuals, depending upon the different laws of different countries, the difficulties which an

examination of such claims would impose upon the captors, and even upon the prize courts, in deciding upon them, and the door which such a doctrine would open to collusion between the enemy owners of the property and neutral claimants, have excluded such cases from the consideration of those Courts." Chief Justice Fuller also cited with approval *THE HAMPTON* (5 Wall. (Amer.) 372) and *THE TOBAGO* (5 C. Rob. 218; 1 Eng. P.C. 456).

To come down to a recent date, in 1905, during the Russo-Japanese war, the Sasebo Prize Court in Japan followed the same lines. In *THE NIGRETIA* [1905] (Takahashi, 551, 553) a preferential claim was made, apparently by a Japanese subject, for salvage expenses incurred before the seizure. It was argued for the petitioner that the preferential right claimed was an "actual right recognized by law, *and not based upon a voluntary contract like a mortgage*," and that therefore it was entitled to protection. The Court of first instance pronounced that "according to international law, the right of a captor being absolute, neither the real right" (by which, no doubt, is meant a right *in rem*) "nor the obligatory right of a third party, can be set up against it." On appeal, the higher Prize Court confirmed this doctrine and the decision.

In *THE RUSSIA* [1904] (Takahashi, 557, 559), in the same Court, a claim for a prior right for necessities was made. The Court said, "If the ship is a lawful prize, she cannot be released on account of a neutral person having a claim against her. Secondly, even though the petitioner's claim was created by the disbursement of the ship's necessary expenses for continuance of the voyage, a third party has no right to make any claim upon the property, as not only is there no provision in our Prize Court Regulations recognising a prior claim upon a prize, but according to International Law the right of the captor to a prize confiscated as the enemy's property is absolute."

These are some of the cases which have come before Courts of Prize since 1856. They follow closely the principles of the older decisions.

The claimants' counsel admitted he was not able to cite in favour of his contentions any decision of any Court, or any statement of any of the eminent writers and jurists of this

or other countries. Probably no such decision or statement exists.

The Court has no hesitation in pronouncing that upon the authorities, upon principle, and upon grounds of convenience and practice, the claim of the neutral mortgagees of this captured vessel must be rejected. The same conclusion would be arrived at if the claim were by British subjects. It need scarcely be added that the Crown, being entitled to captured property, may out of its bounty deal favourably with any such claims.

The case has thus far been dealt with from the points of view presented at the Bar. But there is also another broad ground which can be shortly stated, upon which the claimants could not succeed in any view of their rights. Even assuming that they had a "property" in the vessel, or even if they had rights of ownership and could properly be regarded as the owners of the whole or any part of the vessel, the fact that the vessel was sailing under the German flag, with papers entitling her to do so, and navigated by a German master in the commerce of the German Empire, would be fatal to their claim—see *THE VIGILANTIA* [1798] (1 C. Rob. 1; 1 Eng. P.C. 31), *THE VROW ELIZABETH* [1803] 5 C. Rob. 2; 1 Eng. P.C. 409), *THE PRIMUS* (Spinks, 48; 2 Eng. P.C. 290), and *THE INDUSTRIE* [1854] (Spinks, 54; 2 Eng. P.C. 297).

The doctrine is summed up in *Hall's International Law* (6th ed.), at p. 498. I will make one further reference to one of our late eminent international jurists. Apart from the acknowledged authority which attaches to the work and opinions of the late Mr. Westlake, there is ample judicial support for the statement in his *International Law*, Part II. "War" (ed. 1913), at p. 169: "If a ship sails under the enemy flag, the character which her owner or any of her part owners may have as individuals is immaterial. By accepting the flag they have placed themselves under its protection; if that fails them she may be captured and will be condemned, and no share which a friend may have in her will be saved. A mortgage or lien on a ship sailing under the enemy's flag, whether it arises by contract or by law as a factor's lien—unless it is a general law of the mercantile world, as that which gives the lien of freight—is treated as a part interest in the ship and is not saved from the condemnation.

Upon all these grounds the Court rejects the claim of the mortgagees, but no order will be made against them in respect of costs.

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*Solicitors*—Treasury Solicitor, for Procurator-General; Thomas Cooper & Co., for owners, shareholders, and claimants in respect of disbursements, &c.; Lightbound, Owen & Co., for mortgagees.

[*Reported by Arthur Pritchard, Esq., Barrister-at-Law.*]

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[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). Oct. 29. Nov. 9, 1914.

THE MÖWE.

*Prize Court—Practice—Enemy Merchant Ship—Enemy Owner—Right to Appear—Capture in “Port” or “At sea”—Detention or Condemnation—Hague Peace Conference, 1907, Convention VI. arts. 2 and 3.*

*Apart from the new practice of the Prize Court, an enemy shipowner who alleges no suspension of his hostile character has no right to appear in the Court to argue that his ship, though enemy property, is not subject to condemnation, but only to detention under a Convention of The Hague Peace Conference, 1907.*

*The future practice of the Prize Court shall be that any alien enemy, claiming any protection, privilege, or relief under any such Convention, shall be entitled to appear as a claimant and argue his claim before the Court. He should state the grounds of his claim in his affidavit to lead appearance.*

*An enemy merchant ship was captured on August 5, 1914, at a place in the Firth of Forth, which was not within the limits of a “port” in the usual commercial sense, but was within the limits of the “port” of Leith for Customs purposes:—Held, that the word “port” in the sixth Hague Convention, 1907, did not mean the fiscal port, but must be construed in its usual and limited popular or commercial sense as a place where ships are in the habit of coming for the purpose of loading or unloading, embarking or disembarking and that the vessel, when captured, was not, within the meaning of article 2 of this Convention, at*



*the commencement of hostilities in an enemy "port" and not allowed to leave, so as to be subject only to detention, but was encountered "at sea" within the meaning of article 3 of this Convention, of which this vessel could not claim the benefit, and that the vessel must therefore be condemned as prize.*

Cause for the condemnation of a vessel as prize.

The *Möwe* was a German merchant sailing vessel, and was captured by H.M.S. *Ringdove* in the Firth of Forth in the circumstances stated in the judgment. The master of the vessel, Harm Schier, a German subject and sole owner of the vessel, had entered an appearance, and on his behalf it was contended that the vessel had been seized in a port—namely, the port of Leith—or in territorial waters, and not on the high seas, and was subject not to condemnation, but only to detention under article 2 of Convention No. VI. of The Hague Peace Conference, 1907.

Oct. 29, 1914.—*The Attorney-General (Sir John Simon, K.C.), Holland, K.C., and Norman Bentwich, for the Procurator-General.*—The *Möwe* when captured was not in a "port" within the meaning of that word in articles 1 and 2 of Convention No. VI., but was *en mer*—that is, "at sea"—within the meaning of article 3 of this Convention, and as Germany was not a party to article 3 the vessel cannot escape condemnation. "Port" in articles 1 and 2 has its ordinary meaning—namely, a place where cargoes are loaded or unloaded—see *HUNTER v. NORTHERN MARINE INSURANCE Co.* [1888] (13 App. Cas. 717, at pp. 722, 723). It is immaterial that the vessel was captured within the fiscal limits of the port of Leith, because "port" in articles 1 and 2 has nothing to do with Customs boundaries. A "port" for fiscal purposes has a special meaning. Thus Granton, Morrison's Haven, and Leith are all "the port of Leith" in a fiscal sense, and "the port of Cardiff" for fiscal purposes extends for sixty miles. With regard to the right of this shipowner as alien enemy to be heard in the Prize Court, the Attorney-General submitted—first, that where an alien enemy comes into Court and avows his enemy character without qualification, he is not entitled to be heard; but where while avowing his general enemy character, he has ground for urging that *pro hac vice* he stands in a position which relieves him from the pure enemy character,

he is so entitled—*Story's Notes on the Principles and Practice of Prize Courts*, p. 21. The question was as to which of these rules applies to this enemy shipowner. In the Courts of common law an alien enemy who is defendant can appear—*ROBINSON & Co. v. MANNHEIM INSURANCE Co.* [1914] (84 L. J. K.B. 238; [1915] 1 K.B. 155) and *JANSON v. DRIEFONTEIN CONSOLIDATED MINES, LIM.* [1902] (71 L. J. K.B. 857; [1902] A.C. 484). The position of a claimant in the Prize Court is analogous to that of a plaintiff. But *THE FENIX* [1854] (Spinks, 1; 2 Eng. P.C. 238) supports the view that an alien enemy who has a ground of claim is entitled to be heard in the Prize Court—see also *THE PANAJA DRAPANIOTISA* [1856] (Spinks, 336; 2 Eng. P.C. 560).

*Holland, K.C.*, following the Attorney-General, submitted that the denial of a *locus standi* to alien enemies as plaintiffs was a general rule in all British Courts, and that claimants in the Prize Court were in the position of plaintiffs. This rule was one of procedure, and was unaffected by relaxations in substantive law—for instance, under the Declaration of Paris or Orders in Council as to days of grace. The rule was one of British and not of International Law, and its non-observance by other countries—for instance, Russia and Japan, and possibly in recent decisions in the United States—was immaterial and irrelevant. So general and long-established a rule should not be altered except by Act of Parliament.

*C. R. Dunlop*, for the owner of the *Möwe*.—The owner is interned in this country, and is therefore “resident” here, and enemy character depends on a hostile residence.

[SIR SAMUEL EVANS (THE PRESIDENT).—A novel definition of the word “resident.” You must argue the case as if the enemy character still appertains to the owner.]

This case is indistinguishable from *THE FENIX* (Spinks, 1; 2 Eng. P.C. 238). Further, the owner is not claiming the vessel, but is only praying in aid Convention No. VI. so as to avoid condemnation. In the United States during the Spanish-American War, and in Russia and Japan during the Russo-Japanese War, the principle of allowing the enemy owner to appear was accepted.

[He cited the cases referred to in detail on this point in the judgment.]

[SIR SAMUEL EVANS (THE PRESIDENT).—Without having decided this preliminary question, I will hear you as *amicus Curiae* on the other points.]

“Port” in articles 1 and 2 of Convention No. VI. is not confined to its so-called ordinary meaning, but includes any place where the officers of Customs can seize a vessel. It is opposed to “high seas” in article 3. If a vessel is seized in a port or in territorial waters at the commencement of hostilities she should escape condemnation.

*Cur. adv. vult.*

Nov. 9, 1914.—SIR SAMUEL EVANS (THE PRESIDENT).—This was a merchant sailing vessel of the port of Rhander Moor, in Germany. Her master was Harm Schier, a German subject. He was also the sole owner of the vessel. She was captured by H.M.S. *Ringdove* on August 5 last in the Firth of Forth and taken into Leith. Her ship's papers shewed that she was a German vessel, and had sailed from Norderney in Germany, and that her destination was Bo'ness, in the Forth. The master in an affidavit deposed that he was bound for Morrison's Haven for coal. That statement is not accurate, but in the circumstances it is not material to any issue. He arrived near Morrison's Haven somewhere between 7 and 9 P.M. on August 4. At this time hostilities between this country and Germany had not begun. The declaration of war was made from 11 P.M. on that day. He came to anchor about a mile off the creek of Morrison's Haven. He had a conversation with the officer of Customs of this place; his account of it differs from that of the Customs officer. Again, this is not material to any question in issue. If it were, I accept the latter's account. The master in his affidavit seems to make some point of what he alleged took place, but no argument was based upon this at the trial. Early in the morning of August 5 he weighed anchor and proceeded under way, according to his account, for Granton, a port about eight miles higher up the Firth of Forth than Morrison's Haven. After being under way for about an hour, the vessel was captured as prize by H.M.S. *Ringdove*, when, to use the words in the affidavit of her master, “she was in British territorial waters between Morrison's Haven and Granton.” In a subsequent paragraph he said the vessel was “taken at sea.” It was not shewn that the master knew of the outbreak of war when the vessel was captured, and for the purposes of this case it is assumed that he did not know. An appearance was entered in these prize proceedings by Harm Schier “as owner of the vessel.”

The first question which arises for decision is whether, in the particular circumstances of this case, Schier, an admitted enemy subject and the owner of an enemy merchant ship, has a right to appear as a claimant in the proceedings; or whether he should be given such a right, in order to assert whatever privileges he deems to be conferred upon him by the sixth Hague Convention of 1907.

The second question to be determined is whether the vessel was in an enemy port and not allowed to leave at the commencement of hostilities, or whether she was encountered and captured at sea, within the meaning of the sixth Hague Convention of 1907. Assuming the question to depend upon the Convention, in the former case the vessel is only to be detained and not confiscated in accordance with articles 1 and 2; in the latter she is subject to condemnation, as Germany made a reservation with respect to article 3, and is not a party to it.

Pending the decision upon the first question, I allowed counsel (who was instructed to appear for the enemy owner) to present his arguments fully as *amicus Curix* upon the two questions to be decided.

The question of the right to appear naturally comes first. I have already dealt with this matter in one of its aspects in *THE MARIE GLAESER* [1914] (*ante*, p. 38; 84 L. J. P. 8; [1914] P. 218). In that case an appearance in the proceedings was entered for the enemy owners, but at the hearing no one came forward to represent them. It was obvious that no ground could be shewn either under The Hague Conventions or otherwise against the ship's capture and condemnation; and I ordered the appearance to be struck out both on the ground of the insufficiency of the affidavit upon which the appearance was founded, and on the ground that there were no substantial special circumstances which could be put in any other affidavit in support of any valid claim.

In the case now before the Court, although the affidavit of the claimant is not very aptly drawn to set forth a claim, it is contended that he is entitled under the said Hague Convention to appear to resist condemnation of his vessel, and to secure that the vessel is subjected only to a degree of detention without compensation during the war, or requisition upon making compensation. I will assume that the affidavit sufficiently disclosed the special circumstances in which this contention is put forward.

I will also assume that The Hague Convention referred to is in force and applicable. Upon this a word will be said later.

I referred in *THE MARIE GLAESER* [1914] (*ante*, p. 38; 84 L. J. P. 8; [1914] P. 218) to some decisions of Lord Stowell and Dr. Lushington, and I will not repeat them. There are other decisions to the like effect—for example, in *THE FALCON* [1805] (6 C. Rob. 194, at pp. 197, 199), in which in the following passages Lord Stowell deals with the disabilities of citizens of a hostile State in this Court, and of citizens of this country in the Courts of an enemy: "He is, it seems, invested with the character of the American Consul at Bordeaux; and certain it is, that an American Consul resident in France is subject to all the disabilities of a French merchant, as to the power of becoming a claimant in this Court; . . .

"But I am to recollect who the persons are from whom the objection comes. They are British subjects, who could have no *persona standi* there,"—that is, in French Courts—"and could not have been parties to the proceedings either in the Court of Leghorn, or Paris, without stating themselves out of Court. It was impossible that the proceedings could be otherwise conducted; and, therefore, I cannot think that the absence of the parties, which is urged as a fundamental defect, is material in such a case. It is nothing more than what takes place here in cases of common condemnations, which do not rest solely on the effect of the monition, but pass on a view of the evidence of the case. The enemy proprietor is necessarily absent by operation of law, and yet the sentence is completely valid, as well against him as against all the world."

All the forms since the days of Sir James Marriott, Lord Stowell's predecessor, down to the present day accord with the principle and practice promulgated by Lord Stowell in *THE HOOP* [1799] (1 C. Rob. 196; 1 Eng. P.C. 104)—see *Marriott's Formulary*, 1802, *passim*.

These are followed in some of the forms appended to the recent Prize Court Rules, 1914. See Form 13, where this paragraph appears: "There were at the time of such capture no contraband goods on board the said ship, and no subject of (insert the name of Government at war with Great Britain) or enemy of Great Britain had at the time of such capture, or at any other time material to the matters in this cause, any share, right, title, or interest in the said ship or cargo, or any part

thereof." Far be it from me to wish to decide on mere matters of form, unless compelled thereto by the law; I only cite them to illustrate the principles and practice.

A claimant in a Prize Court is not in a position analogous to that of a defendant, but rather to that of a plaintiff. In the writ the owners of a vessel are not made defendants. But I wish to avoid complicating this case with any discussion of the position or rights of alien enemies in legal proceedings in the King's Bench, or our other municipal Courts.

The principle upon which the Prize Court in the times of Lord Stowell and Dr. Lushington proceeded was that no one who was a subject of the enemy could be a claimant unless under particular circumstances that *pro hac vice* discharged him from the character of an enemy, such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hac vice*. Otherwise such a person was regarded as totally *ex lege*. In the words of Mr. Justice Story in his authoritative *Notes on the Principles and Practice of Prize Courts*, edited by F. T. Pratt. p. 21, "Nor can an enemy interpose a claim, unless under the protection of a flag of truce, a cartel, licence, pass, treaty, or some other act of the public authority suspending his hostile character." In this passage Mr. Justice Story adopted the words of Lord Stowell in *THE HOOP* (1 C. Rob. 196; 1 Eng. P.C. 104), adding by way of illustration the words "licence" and "treaty."

In his argument the Attorney-General submitted two propositions as embodying the result of the authorities in this Court—namely, first, where an owner avowed his enemy character without qualification, he had not a *persona standi in judicio*, and was not a person who had a right to be heard; and secondly, where a person avowed that he was a subject of the enemy state in general, but had ground for urging that *pro hac vice* he stood in a position which relieved him from the pure enemy character, he was entitled to appear and to be heard; and that the real question was under which of these two rules a German owner should be regarded when he came before the Court.

In my opinion that submission is well founded and accurate.

Practical illustrations of the second proposition were frequently afforded in the time of the Crimean War, when claimants appeared on the ground of the immunity of their ships from capture by reason of the Order in Council dated March 29, 1854.

This Order in Council is set out in *Spink's Prize Cases*, App. D. p. iii. That Order allowed six weeks to Russian merchant vessels in any ports or places within the British dominions for loading their cargoes and departing from such ports or places; and also gave permission to such Russian vessels, if met at sea by any of Her Majesty's ships, to continue their voyage, if their cargoes had been taken on board before the expiration of the six weeks. The Order also granted permission to any such Russian vessels which, prior to its date, should have sailed from any foreign port bound for any port or place in the British dominions to enter and discharge their cargoes, and afterwards forthwith to depart without molestation; and if met at sea, to continue their voyage to any port not blockaded. In short, the Order in Council exempted entirely from capture Russian merchant vessels in the special circumstances therein specified.

Claimants whose vessels were within the special terms of the Order therefore brought themselves within the category of persons who were within the Queen's peace *pro hac vice*, and who were relieved from their enemy character, or had their hostile character suspended during the operation of the Order in Council. They were accordingly heard as claimants in the Prize Court.

Reference was made in argument to cases in the American Courts arising during the Spanish-American War in 1898. Upon examination it will be found that in almost all the cases where enemy claimants were heard at that time, their claims arose in circumstances very similar to those in the class of proceedings already referred to which came before the British Prize Court during the Crimean War.

At the outbreak of the war between the United States of America and Spain the President of the Republic issued on April 26, 1898, a proclamation exempting Spanish ships from capture in terms practically identical with the Queen's Order in Council exempting Russian ships forty-four years earlier. Articles 4 and 5 of the President's proclamation were obviously framed upon the British Order in Council of 1854.

Following upon this proclamation of the President, the cases cited before me came before the United States Courts. *THE PEDRO* [1899] (175 U.S. Rep. 354) turned upon articles 4 and 5 of the proclamation. *THE GUIDO* [1899] (175 U.S. Rep. 382) simply followed *THE PEDRO* (175 U.S. Rep. 354). *THE BUENA*

VENTURA [1899] (175 U.S. Rep. 384) depended upon the application of article 5 of the proclamation. THE PANAMA [1900] (176 U.S. Rep. 535) was also decided upon articles 4 and 6 of the proclamation. The other cases cited—namely, THE PAQUETE HABANA [1900] (175 U.S. Rep. 677)—did not depend upon the provisions of the proclamation; but it is to be observed that the claim there put forward and decided was also that the vessel was “exempt from capture.” There may be other cases which I have not been able to examine in which enemy claimants were allowed to appear in the United States Courts; and there may be regulations touching the matter which I have not seen. But the authorities cited fall short of shewing that in the United States any claimant who avowed an enemy character has been allowed generally to appear in their Courts.

In argument before me counsel for the enemy shipowner also compendiously referred to cases which were heard during the Russo-Japanese War in 1904-5, and reported in the *Russian and Japanese Prize Cases* (1912, edited by Hurst and Bray), vol. 1, p. 166; and vol. 2, pp. 1, 12, 39, 46, 52, 92, 95, 116, and 354.

Upon examination of these cases again, it appears that they dealt with claims either of neutrals, or of claimants whose contention was that their property was entirely immune from capture and from sentence of condemnation. In most of them the claim was founded (no doubt among other grounds) upon the Japanese Imperial Ordinance No. 20, of February 9, 1904, which allowed days of grace to certain Russian vessels upon the same lines as the British Order in Council of 1854 and the United States Proclamation of 1898—see Ordinance, Appendix C, vol. 2 of *Russian and Japanese Prize Cases*, p. 445. In THE TETARTOS [1909] (vol. 1, 166), in the Russian Prize Court, the original claimants were the neutral owners of a German ship, which the Russian cruiser captured and sank. It was ultimately held that the ship was wrongfully sunk. Thereupon the liquidator of what was apparently a Japanese company (the Teshio Timber Co., of Otaru), the owners of the cargo which was in the captured ship and was also wrongfully sunk, made a claim which was allowed. The other cases reported at the pages referred to in volume 2 were heard in the Japanese Prize Courts.



IN THE EKATERINOSLAV [1905] (vol. 2, 1) the owners of a Russian vessel claimed exemption from capture on grounds (*inter alia*) coming within the Days of Grace Ordinance (No. 20) already referred to. THE MUKDEN [1905] (vol. 2, 12), THE ROSSIA [1905] (vol. 2, 39), and THE ARGUN [1905] (vol. 2, 46) were also cases in which exemption was claimed (among other grounds) under the same Ordinance. In THE MANCHURIA [1905] (vol. 2, 52) and THE LESNIK [1904] (vol. 2, 92) the Ordinance was relied upon; and in the former case a claim was made on behalf of neutral insurers. The claim in THE KOTIK [1905] (vol. 2, 95) was for exemption as a fishing vessel, and also under Ordinance 20. In THE THALIA [1905] (vol. 2, 116) the vessel was seized in a repairing dock, and the basis of the claim was that she was property "on land," and therefore exempted from capture. And in THE OREL [1905] (vol. 2, 354) the capture was said to be wrongful as the vessel was a hospital ship, and therefore immune; but it was held, notwithstanding, that she was guilty of hostile acts, and therefore subject to condemnation.

I have dealt briefly with these cases, because reliance was placed upon the liberty which was said to be given by the Russian and Japanese Prize Courts to enemy claimants, as adding force to the rights asserted on behalf of enemy owners in this Court. In each of the cases, however, which I have examined, complete immunity was claimed, as I have said. As to Russia, I observe that article 60 of the "Regulations Relating to Naval Prizes" (1895) deals with "original owners of the captured property" in general terms, but I cannot say how these words would be construed.

All the cases mentioned were, of course, before The Hague Conventions of 1907. Under The Hague Convention No. VI. the attitude which the owner in the present case must take may shortly be stated in these terms: "I admit I am an alien enemy; and therefore that my ship was lawfully captured, or seized, as being enemy property; but I wish to appear to put forward and argue my claim that in the circumstances of my case the ship is not confiscable, and cannot be condemned; but can only be detained during the war, to be restored to me after the war."

Applying the principles laid down by Lord Stowell and Dr. Lushington, I am satisfied that in their day they would not have allowed the enemy owner to appear to assert such a claim.

There is no coming *pro hac vice* within the King's peace; there is no suspension of the hostile character. As to what those eminent Judges would have done if they lived in the present day I will not hazard a conjecture.

As before indicated, I desire to say a word as to whether The Hague Convention No. VI. is operative and applicable. I cannot close my eyes to the provision in article 6 of the Convention, which reads as follows: "The provisions of the present Convention do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention." By articles 7 and 9 the Convention requires to be ratified by the signatory Powers, and by article 8 non-signatory Powers may accede to the Convention. Similar articles appear in the other Conventions enumerated hereafter.

Of the belligerents in the present war at the time of the capture of the vessel, Germany and Austria-Hungary, and Belgium, France, Great Britain, Japan, and Russia had ratified the Convention (Germany and Russia making reservations of article 3 and part of article 4). Of the other belligerents, Montenegro and Serbia (whose representatives signed the Convention) have not ratified it. Turkey, who is now also a belligerent, has not ratified it. None of these States were non-signatory Powers, so there has been no accession on the part of any of them. In strictness, therefore (apart entirely from the question whether the enemies of this country are acting under or in accordance with the Convention), it is not clear that the Convention is binding or applicable.

It is not my function or province to do anything more than to declare the law. But I trust to be forgiven for a humble expression of opinion that it would accord with the traditions of this country if such steps were taken as may be necessary to make operative a series of Conventions solemnly agreed upon by the plenipotentiaries of forty-five States or Powers after most careful deliberation, with the most beneficent international objects.

I am not required finally to determine the effect or the binding character of the Conventions. This Court would be mainly concerned with the sixth, seventh, tenth, and eleventh of them as dealing more directly with maritime concerns, although, incidentally, others of them—for example, the third, eighth, and thirteenth—might come under consideration in proceedings

before it. Of the belligerents, Montenegro has no navy, and, so far as I know, no mercantile marine; it has a coastline, but only of about thirty miles; and Serbia is a purely inland State, having no seaboard at all. It would scarcely seem desirable that the non-ratification by these Powers should prevent the application of the maritime Conventions; and it may be that the counsellors who have the responsibility of advising the Crown may deem it fit to advise that by proclamation or otherwise this country should declare that it will give effect to the Conventions, whether by the literal terms thereof they are strictly binding or not.

Having premised so much, I will now consider whether the owners of an enemy vessel have a right, or should be given the right, to appear to put forward a claim under The Hague Conventions, assuming, as was done during the argument, that they are operative. Under some of the Conventions some degree of protection and relief is given in respect of vessels which are not wholly immune from capture at sea or seizure in ports; for example, under the sixth Convention the consequences of seizure or capture are minimised and limited in certain cases, although complete immunity is not afforded. Under others of the Conventions some vessels are entirely exempted from capture. For instance, under the tenth Convention, hospital ships are free from capture, except in certain specified circumstances; and under the eleventh Convention certain coast fishing vessels and local trading boats, as well as those employed on religious, scientific, or philanthropic missions, are similarly exempted. With regard to vessels comprised within the tenth and eleventh Conventions, the cases which might arise would approach nearly to those of vessels which came within the protection afforded by the Order in Council of 1854.

Dealing with The Hague Conventions as a whole, the Court is faced with the problem of deciding whether a uniform rule as to the right of an enemy owner to appear ought to prevail in all cases of claimants who may be entitled to protection or relief, whether partial or otherwise.

Mr. Holland argued that this is a matter not of International Law, but of the practice of this Court. That view is correct. I think that this Court has the inherent power of regulating and prescribing its own practice, unless fettered by enactment. Lord

Stowell from time to time made rules of practice, and his power to do so was not questioned.

Moreover, by Order XLV. of the Prize Court Rules, 1914, it is laid down that "In all cases not provided for by these Rules, the practice of the late High Court of Admiralty in England in prize proceedings shall be followed, or such other practice as the President may direct." The Rules do not provide for the case now arising. I therefore assume that as President of this Court I can give directions as to the practice in such cases as that with which the Court is now dealing.

The practice should conform to sound ideas of what is fair and just. When a sea of passions rises and rages as a natural result of such a calamitous series of wars as the present, it behoves a Court of justice to preserve a calm and equable attitude in all controversies which come before it for decision, not only where they concern neutrals, but also where they may affect enemy subjects. In times of peace the Admiralty Courts of this realm are appealed to by people of all nationalities who engage in commerce upon the sea, with a confidence that right will be done. So in the unhappy and dire times of war the Court of Prize as a Court of justice will, it is hoped, shew that it holds evenly the scales between friend, neutral, and foe.

A merchant who is a citizen of an enemy country would not unnaturally expect that when the State to which he belongs, and other States with which it may unhappily be at war, have bound themselves by formal and solemn Conventions dealing with a state of war, like those formulated at The Hague in 1907, he should have the benefit of the provisions of such international compacts. He might equally naturally expect that he would be heard, in cases where his property or interests were affected, as to the effect and results of such compacts upon his individual position. It is to be remembered also that, in the international commerce of our day, the ramifications of the shipping business are manifold, and others concerned, like underwriters or insurers, would feel a greater sense of fairness and security if, through an owner (though he be an enemy), the case for a seized or captured vessel were permitted to be independently placed before the Court.

For the considerations to which I have adverted, and in order to induce and justify a conviction of fairness, as well as to promote just and right decisions, I deem it fitting, pursuant to

powers which I think the Court possesses, to direct that the practice of the Court shall be that whenever an alien enemy conceives that he is entitled to any protection, privilege, or relief under any of The Hague Conventions of 1907, he shall be entitled to appear as a claimant and to argue his claim before this Court. The grounds of his claim should be stated in the affidavit to lead to appearance which is required to be filed by Order III. rule 5 of the Prize Court Rules, 1914.

I will now proceed to deal with the substance of the claim of the owner in the present case. He contends that his vessel cannot be condemned as prize. Was his vessel captured at sea, or seized in port? It was argued for him that she was seized in port, and therefore ought only to be detained during the war. For the Crown, on the other hand, it was contended that the vessel was captured at sea, and ought to be condemned. I have sufficiently stated the facts.

It was urged that the vessel was seized within the port of Leith, and, alternatively, that she was taken within territorial waters, and not "on the high seas," and therefore is not confiscable. See article 3 of the sixth Hague Convention, to which Germany did not agree, and under which her citizens cannot benefit.

In this Convention I am of opinion that the word "port" must be construed in its usual and limited popular or commercial sense as a place where ships are in the habit of coming for the purpose of loading or unloading, embarking or disembarking. It does not mean the fiscal port. The ports of Morrison's Haven, Granton, and Bo'ness, I was informed, are within the fiscal port of Leith, but they are all separate ports in the ordinary sense. The vessel was not seized in any of such "ports" as the term is so understood, and as it seems to me to be used in the Convention. She was not in a port from which, if days of grace had been arranged, she could be said to "depart" ("*sortir*"). Alternatively, it was alleged but not proved that she was taken in "territorial waters," and that therefore she was not captured on the high seas. But I will assume that she was within territorial waters when the capture was made. In my view that is wholly immaterial. The sixth Hague Convention does not refer to "territorial waters." A vessel might be in territorial waters for scores of miles, either innocently or nefariously, and pass numerous ports, without any intention to

enter any of them. It is idle to say that on this account she would be free from capture. Where The Hague Conventions intended to deal with territorial waters they are expressly mentioned as distinguished from "port"—for example, in Convention XII. arts. 3 and 4, and Convention XIII. arts. 2, 3, 9, 10, &c. the words "*les eaux territoriales*" are used in contradistinction to "*les ports*." (Cf. also the Declaration of London, art. 37, where territorial waters are described as "*les eaux des belligérants*.") "*En mer*," which is the phrase used in article 3 of the sixth Convention, is also inapt to indicate "territorial waters."

Then it was contended that the vessel could not be condemned because she was not captured on "the high seas." The words "encountered on the high seas," in article 3, are not an accurate rendering of the authoritative French, "*rencontrés en mer*." Where the Conventions intend to describe "upon the high seas," the appropriate phrase "*en pleine mer*" is used. See Convention VII., recital. Another phrase, "*en haute mer*," is used in the Declaration of London, art. 37, to signify the same thing.

To illustrate the meaning of the word "port" in the Conventions I would further observe that the word "ports" is used in various places in conjunction with, but in contradistinction to, roadsteads, and to territorial waters. See Convention XIII., where the words "*les ports, les rades, ou les eaux territoriales*" are frequently used.

In my view the claimant in his affidavit was accurate when he said his vessel was "taken at sea." The words of article 3, "*rencontrés en mer*," are exactly applicable to this case. And I have no hesitation in finding that she was captured at sea, and not seized in port. I therefore decree that the vessel be condemned as lawful prize.

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Solicitors—Treasury Solicitor; Stokes & Stokes.

[Reported by Arthur Pritchard, Esq., Barrister-at-Law.]

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## [ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). NOV. 23, 24. DEC 7, 1914.

## THE ROUMANIAN.

*Prize Court—Prize Jurisdiction—Cargo of Oil—Discharge into Tanks—Droits of Admiralty—Seizure “on land” or in “port”—Enemy National Character—German Company—International Combine—Notice of Detention—Ambiguity—Lawful Seizure.*

A cargo of oil was shipped on a British steamship at Port Arthur, Texas, for delivery at Hamburg. The oil was the property of a German incorporated company, which was an international combine, and most of its shares were held by incorporated companies of nations which were not enemies. During the voyage and after the outbreak of war with Germany the vessel, owing to a request of the Admiralty, was diverted eventually to London and was moored at a wharf. The oil was discharged into tanks belonging to the wharfingers, one hundred to one hundred and fifty yards away from the wharf, by means of the ship's pumps and connecting pipes. Notice by an officer of Customs that the whole cargo was “placed under detention” was delivered on board when most of the oil had been discharged, but the remaining oil was afterwards discharged into the tanks:—Held, first, that the whole cargo of oil should be condemned as droits of Admiralty, and that the case was within the jurisdiction of the Prize Court; that the oil in the tanks was seizable even if it was strictly “on land” and not in “port,” but that the tanks were oil warehouses and the oil therein was seized in “port”; secondly, that the German company, being incorporated and resident in Germany, was of an enemy national character, notwithstanding its international position; and thirdly, that the Customs notice that the cargo was placed under detention was a lawful seizure of the oil as droits of Admiralty, and the contention that the notice was too ambiguous was disallowed.

Cause for the condemnation of a cargo of petroleum as prize and droits of Admiralty.

Before the outbreak of war on August 4, 1914, between Great Britain and Germany, a cargo of 6,264 tons of petroleum

oil in bulk was shipped under charterparty and bill of lading in the British tank steamship *Roumanian* at Port Arthur, Texas, to be delivered at Hamburg on payment of freight at the rate of 22s. per ton of 20 cwts. of oil intake quantity. The owners of the *Roumanian* were the Petroleum Steamship Co., Lim., of London; and this company is referred to hereafter as "the steamship company." The cargo of oil was at all material times the property of a German company, the Europäische Petroleum Union Gesellschaft, M.B.H., of Bremen; and this company is referred to hereafter as "the German company." The German company was an international combine, and most of the shares in it were held by incorporated companies of other nations which were not enemies. The British Petroleum Co., Lim., were wharfingers and the owners of the tanks at Purfleet on the river Thames, into which the oil was eventually discharged; and this company is referred to hereafter as "the tank company."

The following statement of facts is taken from the judgment:

"While the *Roumanian* was on her voyage on the high seas, the Secretary of Lloyd's wrote to the managers of the steamship company that the Lords Commissioners of the Admiralty had suggested that in the national interest the *Roumanian*, which, according to Lloyd's records, was then on passage to Hamburg, should be diverted to a United Kingdom port. When the vessel had reached the English Channel her master (Mr. Ross), on or about August 14, received instructions from her owners through Lloyd's signal station at Prawle Point to proceed to Dartmouth for orders. The vessel was accordingly put into Dartmouth, arriving there apparently on August 14. There she remained until August 20, when her owners ordered her to proceed to London. She arrived at Purfleet on August 21, and was moored at the tank company's wharf at noon of that day. The discharge of the oil into the tanks of the tank company by means of pumps and connecting pipes was immediately begun. Information has in such cases to be given, and was in this case given, by the shipbrokers to the Custom House officer of the arrival of the steamship, in order that the oil may be tested for the purpose of ascertaining whether the particular oil is subject to duty or not. The Custom House officer does not release oil cargo until he has tested it and ascertained whether duty is payable on it or not. The officer visited the steamer at Purfleet on August 21,



about 4 P.M. Some of the oil had already been discharged. He tested a sample taken from one of the ship's tanks with the specific gravity instrument. It was somewhere near the dutiable line, so he took away a sample to be tested in the laboratory of the Custom House. He again went to the vessel at 3.30 P.M. on the next day (August 22) and took another sample, this time from the discharging pipe. He did not receive the test note from the Custom House analyst until August 24. Meantime, on August 22 (about 7 P.M.), a letter was delivered on board the steamer from the Custom House officer at Gravesend, of which the following is a copy: 'To the Master, s.s. *Roumanian*, Purfleet. Custom House, Gravesend, August 22, 1914. Sir,—I have to inform you that your cargo consisting of about 6,264 tons of refined petroleum is placed under detention.—Your obedient servant, H. Burrell, Senr.'

"This was the seizure, by one of the special war staff of the Customs on behalf of the Crown, of the cargo as prize. At this time, in round figures, 4,800 tons had been discharged from the vessel into the tanks, and 1,400 tons still remained in the vessel. To complete the story, the test note afterwards given on August 24 shewed that the oil was of a quality admitted free of duty. The Customs officer first referred to deposed that until the cargo is certified free of duty it is still regarded as being in the charge of the Customs, and an offence against the Revenue laws would have been committed if any delivery had taken place before."

The discharge of the oil was continued after the letter was received on board, and was completed early on August 23. The distance of the tanks from the wharf was between 100 and 150 yards, and they were used in conjunction with the wharf for dealing with oil cargoes. The ship's pumps were used for discharging the oil.

The Procurator-General applied for the condemnation of the whole cargo of oil. The chief claimants were the German company, as the owners of the cargo of oil, and certain shareholders in this company, and their main allegations were that the oil could not lawfully be seized as it had been, and, alternatively, that a portion of the oil discharged into tanks on shore could not lawfully be so seized. Other claimants were the steamship company in respect of freight and demurrage, and the tank company in respect of their charges as wharfingers.

Nov. 23, 24, 1914.—*The Attorney-General* (Sir John Simon, K.C.) and *Theobald Mathew*, for the Procurator-General.—The whole cargo was rightly seized as enemy property by the officer of Customs for the Crown by the notice of detention on August 22. As regards the oil already discharged into the tanks, it was still as much in the custody of the Customs as if it had remained in the ship. This part of the oil was goods seized in "port." A "port" consists partly of "something that is artificial, as quays and wharfs, and cranes and warehouses,"—*Sir Matthew Hale, De Portibus Maris*, Cap. II., cited in *FOREMAN v. FREE FISHERS OF WHITSTABLE* [1869] (38 L. J. C.P. 345, 350; L. R. 4 H.L. 266, 285). The ordinary prize jurisdiction extends to captures made in British ports (*Pratt's Story*, p. 28), and it is not ousted merely because the goods are landed—*LINDO v. RODNEY* [1782] (2 Dougl. 613*n.*). And if a cargo is seized in port it cannot escape merely because it has been landed—*THE TWO FRIENDS* [1799] (1 C. Rob. 271, 282, 283, 284; 1 Eng. P.C. 130). *BROWN v. UNITED STATES* [1814] (8 Cranch (Amer.), 110) is no authority to the contrary. Strictly the Crown could have seized this property, as it can seize any enemy property, anywhere on land within the realm; but the special right to seize enemy property as prize, over which the Court has jurisdiction, extends at any rate to goods landed from a ship on to the quay in circumstances like the present.

[SIR SAMUEL EVANS (THE PRESIDENT).—These goods are maritime merchandise?]

Yes. As regards the German company, it will be suggested that it should not be treated as an enemy, because its shares are largely held by other incorporated companies which belong to neutral or allied nations. But the Court cannot look beyond the legal entity, which is the German company; further, if it could, it would have to consider how far the shareholders in the neutral or allied companies were enemies.

As regards the alleged six days' demurrage at Dartmouth, the steamship company cannot recover that; if they had not put in here, but proceeded to Hamburg, their vessel would have been condemned there.

As regards freight, the Crown, without admitting liability, but considering that the vessel was diverted to a British port by request, will pay *pro rata* freight, to be ascertained by a reference. The Crown will also pay the reasonable charges

for landing and storing the oil, also to be ascertained by a reference.

*Maurice Hill, K.C.*, and *Balloch*, for the steamship company and the tank company, and with *C. Robertson Dunlop*, for the German company and certain shareholders therein.—No part of the oil is liable to condemnation. To constitute a valid capture there must always be some act done manifesting the intention to seize and retain the prize—*Upton, The Law of Nations affecting Commerce during War* (1863), p. 189. The letter of August 22 was not such an act, but was at best ambiguous, and may merely have meant detention for Customs purposes. Therefore all the cargo was landed before the seizure, the act of seizure being really the writ long afterwards. The oil had passed in the way of civil bailment on shore to the tank company, and could not afterwards be arrested in prize—*THE OOSTER EEMS* [1784] (1 C. Rob. 284*n.*; 1 Eng. P.C. 136*n.*), as explained in *THE TWO FRIENDS* (1 C. Rob. 271, 284; 1 Eng. P.C. 130). The hand of capture was not employed on this oil in quality of cargo—*THE HOFFNUNG* [1807] (6 C. Rob. 383, 386; 1 Eng. P.C. 583, 585), and *THE CHARLOTTE* [1808] (6 C. Rob. 386*n.*; 1 Eng. P.C. 585*n.*). This oil was property seized on British territory, and is not the subject of prize jurisdiction—*Pratt's Story*, p. 28; *BROWN v. THE UNITED STATES* (8 Cranch (Amer.), 110). *LINDO v. RODNEY* (2 Dougl. 613*n.*) was the case of a capture by naval force on hostile territory. The jurisdiction of the Prize Court in case of capture on land is limited to public property captured by an expedition—*Naval Prize Act, 1864* (27 & 28 Vict. c. 25), s. 34; and the Court had no jurisdiction over booty—property captured on land by land forces exclusively—except by statute—*BANDA AND KIRWEE BOOTY* [1866] (35 L. J. Adm. 17; L. R. 1 A. & E. 109). The *Europäische Petroleum Union Gesellschaft, M.B.H.*, is a German company, but it is an international combine composed of companies and subjects of all nationalities. Such a company should not be treated as an enemy; but account should be taken of the various persons belonging to allied or friendly nations which constitute its shareholders, because otherwise prize procedure which is intended for the seizure of enemy property is diverted from its purpose so as to attack allies and neutrals.

*Theobald Mathew*, in reply, as to the meaning of "port," referred to *THE MÖWE* [1914] (*ante*, p. 60; 84 L. J. P. 57; [1915] P. 1).

*Cur. adv. vult.*

Dec. 7, 1914.—SIR SAMUEL EVANS (THE PRESIDENT).—This cargo consisted of 6,264 tons of refined petroleum oil in bulk. It was shipped on the steamship *Roumanian* at Port Arthur, Texas. The commercial documents are in evidence. Without going into detail, it is sufficient to say that the shipment took place before the outbreak of the war, and that the cargo of oil was destined for Hamburg. At all times material for this decision the oil was the property of a German company. At all material times, therefore, the oil was the property of enemy subjects.

As enemy property, it is claimed by the Crown as having been seized on behalf of the Crown as lawful prize in right of the Crown to droits of Admiralty. On the other hand, the German company owners claim that it could not lawfully be so seized; and, alternatively, that a portion of the oil which had already been discharged into oil tanks on shore could not lawfully be so seized. There are other claims by the owners of the steamship for freight and other charges and expenses, and also by the proprietors of the tanks for charges and expenses due to them as wharfingers. These latter claims have to some extent been dealt with by consent, and will be disposed of at the end of this judgment. The main question arises upon the claim put forward by the owners of the oil.

Three limited companies come into the history of the case. I will, for convenience sake, now describe them, and afterwards refer to them by shorter titles. They are:

(1) The Europäische Petroleum Union Gesellschaft, M.B.H., of Bremen. Neutral bodies and subjects are shareholders to a considerable extent in this company. It is a corporate body duly incorporated under the laws of Germany, and as such entered an appearance in these proceedings. There was some discussion in argument as to its constitution, but it was not really denied that it was a German company. It clearly is. This company I shall hereafter refer to as "the German company." They were the owners of the cargo of oil.

(2) The Petroleum Steamship Co., Lim. This company was an English company incorporated under the Companies Acts, 1908 and 1913. The vast majority of the shares were owned by the German company, but there were also English shareholders and English directors, and its business was carried on in this country. This company I shall hereafter refer to as

"the steamship company." They were the owners of the steamship *Roumanian*.

(3) The British Petroleum Co., Lim. The same remarks apply. This was also an English company, and is hereafter referred to as "the tank company." They were wharfingers, and the owners of the tanks into which some of the oil had been discharged.

The material facts are substantially undisputed. I will state them shortly. [The learned Judge then stated the facts, as set out above, and then proceeded:] As to the quantity of 1,400 tons which remained in the ship, it is quite clear that, by International Law, it was confiscable as prize on board a ship which arrived in port after outbreak of hostilities. In the claim the German owners invoke The Hague Convention, No. VI. But this Hague Convention is not applicable at all in this case. If the case is regarded as analogous to that of an enemy cargo on board an enemy ship under articles 3 and 4 of the Convention, in any event German subjects could not found any claim under those articles, because Germany declined to agree to them and is not a party to them.

But the main and important questions contested between the Crown and the claimants was whether the 4,800 tons, already discharged and in the tanks of the tank company, were confiscable as prize and droits of Admiralty.

The broad foundation of the argument for the German company was that this oil was on land, and that enemy property on land cannot be seized as prize. The tanks were contiguous to the tank company's wharf, where the ship was moored, and were used in conjunction with the wharf for dealing with oil cargoes. Their distance from the wharf was between 100 and 150 yards.

This important question may be approached from two aspects. In the first place, was the oil in the tanks "on land" as this phrase has been used in International Law, or was it still in "port" for the purpose of applying the principles of seizure of enemy property in port? Secondly, even if in strictness it was "on land," was it in the circumstances of this case immune from seizure and free from confiscation in a Court of Prize?

Before dealing particularly with these two questions it would be helpful to look at the whole subject more generally.

According to the practice of former times, and according to the views held by some of the most revered and authoritative international jurists, all enemy property on land, as well as on sea and in ports, creeks, and rivers, could be captured and confiscated. But from time to time, by special treaties, and subsequently by the mitigation of rules considered to operate harshly on enemy owners of private properties, capture of such properties on land has been avoided and has fallen into desuetude.

The present position is well stated by Hall in his work on *International Law* (6th ed.), p. 435: "Upon the whole, although, subject to the qualification made with reference to territorial waters," (that is, excepting property entering territorial waters after the commencement of the war, see page 431), "the seizure by a belligerent of property within his jurisdiction would be entirely opposed to the drift of modern opinion and practice, the contrary usage, so far as personal property is concerned, was until lately too partial in its application, and has covered a larger field for too short a time to enable appropriation to be forbidden on the ground of custom as a matter of strict law; and as it is sanctioned by the general legal rule, a special rule of immunity can be established by custom alone. For the present therefore it cannot be said that a belligerent does a distinctly illegal act in confiscating such personal property of his enemies existing within his jurisdiction as is not secured upon the public faith; but the absence of any instance of confiscation in the more recent European wars, no less than the common interests of all nations and present feeling, warrant a confident hope that the dying right will never again be put in force, and that it will soon be wholly extinguished by disuse."

It ought, however, to be borne in mind—what, indeed, is often forgotten—that a potent factor and a beneficent object in the mitigation of the severity of seizure on land, was the desirability of saving from confiscation the property of citizens of an enemy State which was already in the belligerent country at the outbreak of war. A beginning was made by exempting moneys lent by individuals of an enemy State to a belligerent State. Then real and immovable property was made an exception, at first from absolute confiscation, and later from sequestration of its income. Then came treaties allowing time

for the withdrawal of mercantile property from a belligerent country at the outbreak of war.

Hall, in the work already referred to (p. 434), speaks of this advance and the reasons for it as follows: "The custom which has become general of allowing the subjects of a hostile State to reside within the territory of a belligerent during good behaviour brings with it as a necessary consequence the security of their property within the jurisdiction, other than that coming into territorial waters, and indirectly therefore it has done much to foster a usage of non-confiscation; but as it is not itself strictly obligatory, it cannot confer an obligatory force, and the treaties which contain stipulations in the matter, though numerous, are far from binding all civilised countries even to allow time for the withdrawal of mercantile property."

I have before had occasion to refer to a note by Dana in his edition of *Wheaton* (8th ed. 1866, p. 451, note 171). It not only deals admirably with the distinction between seizure on land and capture at sea, but it also gives prominence to the reasons why "maritime merchandise" and "cargoes" should be differently regarded, without, I think, making a qualification that the "merchandise" or "cargoes" must be actually afloat at the time of the seizure. However this may be, I make no apology for citing the passage as containing considerations worthy of being noted in connection with the present case. "*Distinction between Enemy's Property at Sea and on Land.*— . . . War is the exercise of force by bodies politic, for the purpose of coercion. Modern civilisation has recognised certain modes of coercion as justifiable. Their exercise upon material interests is preferable to acts of force upon the person. Where private property is taken, it is because it is of such a character or so situated as to make its capture a justifiable means of coercing the power with which we are at war. If the hostile power has an interest in the property which is available to him for the purposes of war, that fact makes it *primâ facie* a subject of capture. The enemy has such an interest in all convertible and mercantile property within his control, or belonging to persons who are living under his control, whether it be on land or at sea; for it is a subject of taxation, contribution, and confiscation. The humanity and policy of modern times have abstained from the taking of private property, not liable to direct use in war, when on land. Some of the reasons

for this are the infinite varieties of the character of such property,—from things almost sacred, to those purely merchantable; the difficulty of discriminating among these varieties; the need of much of it to support the life of non-combatant persons and of animals; the unlimited range of places and objects that would be opened to the military; and the moral dangers attending searches and captures in households and among non-combatants. But, on the high seas, these reasons do not apply. Strictly personal effects are not taken. Cargoes are usually purely merchandise. Merchandise sent to sea is sent voluntarily; embarked by merchants on an enterprise of profit, taking the risks of war; its value is usually capable of compensation in money, and may be protected by insurance; it is in the custody of men trained and paid for the purpose; and the sea, upon which it is sent, is *res omnium*, the common field of war as well as of commerce. The purpose of maritime commerce is the enriching of the owner by the transit over this common field, and it is the usual object of revenue to the power under whose government the owner resides.

“The matter may, then, be summed up thus: Merchandise, whether embarked upon the sea or found on land, in which the hostile power has some interest for purposes of war, is *primâ facie* a subject of capture. Vessels and their cargoes are usually of that character. Of the infinite varieties of property on shore, some are of this character, and some not. There are very serious objections, of a moral and economical nature, to subjecting all property on land to military seizure. These objections have been thought sufficient to reverse the *primâ facie* right of capture. To merchandise at sea, these objections apply with so little force that the *primâ facie* right of capture remains.”

We start, accordingly, in considering the present case, with the broad proposition that all enemy property—ships and cargoes—may, after the outbreak of war, be captured *jure belli* on the sea or in rivers, ports, and harbours of this country. (There are other captures which can be made which do not concern this case.) All such captures are tried in the Prize Court and can only be condemned in this Court.

In days gone by, constant contests and quarrels were waged between the common law Courts and the Court of Admiralty as to the jurisdiction claimed by the latter to deal with causes,



civil and marine, in ports, harbours, rivers, or creeks, within the body of a county which the common law Courts asserted could only be tried at law.

But the jurisdiction and exclusive jurisdiction of the Court of Admiralty in prize was never doubted. "The nature of the ground of the action—*prize or not prize*—not only authorizes the prize court, but excludes the common law"—Lord Mansfield in *LINDO v. RODNEY* (2 Dougl. 615n.). These functions of the Prize Court have now been allotted to this Division of the High Court, and contests between the various Divisions would not now occur. It was considered, however, that the Judicature Acts did not render unnecessary the Commission which had been issued by the Crown at the beginning of each war; and accordingly a Commission was issued at the beginning of this war, in, I think, the same operative terms as the old Commissions. By this Commission the Court is "authorised and required to take cognisance of and judicially to proceed upon all and all manner of captures, seizures, prizes and reprisals of all ships, vessels and goods that are or shall be taken, and to hear and determine the same; and according to the course of Admiralty and the law of nations, and the statutes, rules and regulations for the time being in force in that behalf, to adjudge and condemn all such ships, vessels and goods as shall belong to the German Empire or the citizens or subjects thereof, or to any other persons inhabiting within any of the countries, territories or dominions of the said German Empire, which shall be brought before you for trial and condemnation." (A separate Commission was issued in reference to Austria-Hungary.) As Lord Mansfield said in *LINDO v. RODNEY* (2 Dougl. 615n.): "It"—that is, the Commission—"don't say—upon the sea. It don't say—goods in the ship. '*Reprisals*' is the most general word that can be used." And he proceeded: "In causes *civil and marine*, to give jurisdiction to the court of Admiralty,"—by which he meant the ordinary jurisdiction of the Court—"the libel must allege the cause of suit to be done upon the high sea, and, therefore, if that had been the intention of the commission, or the rule of law,"—that is, in relation to the jurisdiction in prize—"it would certainly have been so expressed in the commission."

Now, in this case the steamship *Roumanian*, from the moment of the outbreak of war, carried an enemy cargo. This

cargo, as such, was subject to capture or seizure as prize, either on the high seas or after the arrival of the vessel in port. The vessel was not bound to come into a port of this country. But she was in a dilemma. Her cargo was destined for and consigned to the port of Hamburg, by the joint operation of the charterparty and the bill of lading. To deliver the cargo at Hamburg was forbidden; that would be trading and having intercourse with the enemy. To remain at sea was not practicable. If she proceeded to any other country's port, or indeed wherever she proceeded at sea, she was liable to be captured by a German cruiser—if that had happened, she might have been taken to Hamburg, and the German company might have secured their cargo; and the enemy State might capture the vessel herself into the bargain. Of course, those responsible for the vessel were quite right in diverting her into a port of this country.

Now, examine the consequences relating to the cargo and its owners. As the vessel came, and properly came, into a British port, she could not help bringing the oil laden in her into the port too, unless she previously pumped it into the sea. She was not bound to do that. Apart from the labour and waste of it, she might have looked forward in hope to securing her freight out of the cargo.

But, if I may personify the cargo for a moment, I would ask, What right of entry had it into this country? What right had it to expect protection in this country at some one's care and expense for the sake of its owners? Its owners could not have ordered its delivery to any one here on their behalf; no one could have accepted its delivery for them, as that would be against the law. It may be that the shipowners could have exercised their lien for freight by selling it, or part of it, if it had not been seized, but they did not purport to do so. It was delivered—no, that is an ambiguous term—4,800 tons of it were pumped into the tanks; and there it was, subject to some kind of tacit understanding as to the lien for freight. It was a sort of *nullius bona*. It came into the port as maritime merchandise of the enemy subject to seizure, and in my opinion the whole of it remained such, until it was actually formally seized on behalf of the Crown on August 22. I cannot see how or by what process the portion of it which was at one end of the pipe in the tanks on shore had ceased to be seizable enemy

cargo any more than the portion remaining in the ship at the other end had. In my opinion, the view that one part was seized in port, and the other on land and not in port, would be pedantic and erroneous.

But in deference to the arguments upon the points raised, I must deal with them and with the cases cited, to which a few other cases will be added.

It was strenuously argued, as to the 4,800 tons, that the seizure was on land as distinguished from in port; and therefore that this Court had no jurisdiction over it as prize.

The word "port" may bear different meanings in different connections. In relation to enemy goods—by their nature the subject of naval prize when at sea after the commencement of the war—I think the word "port" has a meaning extended beyond the part covered with water in which a ship carrying the goods would be afloat. Indeed, counsel for the German owners conceded that a wharf alongside would come within the "port" in this sense, although it would be strictly "on land." I fail to see what difference the hundred yards from the edge of the wharf ought to make.

Sir Matthew Hale, in his *De Portibus Maris*, Cap. II. (*Hargrave's Law Tracts*, pp. 46, 47, 48), describes "ports" and "creeks" as follows:

"A *port* is an haven, and somewhat more.

"1st. It is a place for arriving and unloading of ships or vessels.

"2nd. It hath a superinduction of a civil signature upon it, somewhat of franchise and privilege, as shall be shewn.

"3rd. It hath a *ville* or city or borough, that is the *caput portus*, for the receipt of mariners and merchants, and the securing and vending of their goods and victualling their ships. So that a port is *quid aggregatum*, consisting of somewhat that is natural, viz. an access of the sea whereby ships may conveniently come, safe situation against winds where they may safely lye, and a good shore where they may well unlade; something that is artificial, as keys and wharfs and cranes and warehouses and houses of common receipt; and something that is civil, viz. privileges and franchises, viz. *jus applicandi*, *jus mercati*, and divers other additaments given to it by civil authority. . . .

"A creek is of two kinds, viz. creeks of the sea, and creeks of ports.

"The former sort are such little inlets of the sea, whether within the precinct or extent of a port or without, which are narrow little passages, and have shore of either side of them. The latter, viz. creeks of ports, are by a kind of civil denomination such. They are such, that though possibly for their extent and situation they might be ports, yet they are either members of, or dependent upon other ports. And it began thus. The King could not conveniently have a customer and comptroller in every port or haven. But these custom-officers were fixed at some eminent port; and the smaller adjacent ports became by that means creeks, or appendants of that where these custom-officers were placed."

It will be observed that "warehouses" are expressly included in the definition of "port." And the tank company's tanks in the present case could not be placed in a category higher than, or different from, warehouses. The tanks are oil warehouses.

THE OOSTER EEMS<sup>1</sup> (1 C. Rob. 284*n.*; 1 Eng. P.C. 136*n.*) and THE TWO FRIENDS (1 C. Rob. 271; 1 Eng. P.C. 130) were referred to. The facts in those cases were quite different. Of THE OOSTER EEMS (1 C. Rob. 284*n.*; 1 Eng. P.C. 136*n.*) Lord Stowell said in THE TWO FRIENDS (1 C. Rob., at p. 283; 1 Eng. P.C., at p. 136) "that those goods had never been taken on the high seas, they had only passed in the way of civil bailment, on delivery into civil hands; and were afterwards arrested on shore as prize." And in THE TWO FRIENDS (1 C. Rob., at p. 284; 1 Eng. P.C., at p. 136) Lord Stowell would not accede to the argument that the goods, being on shore, were out of the jurisdiction of the Court of Admiralty in prize. The concluding paragraph of his judgment is: "But the present case is radically bottomed in prize; and if so, all the consequences of prize will follow. If the goods are removed before proceedings are commenced, they are still liable to be called in by a monition.—A different way has been taken in this case by a personal monition, as more convenient to the

(1) As to THE OOSTER EEMS, see Decisions in the High Court of Admiralty in the times of Hay and Marriott, preface p. xxviii., where the learned author states that this case has been reported with inaccuracy, and points out that this case came to the High Court of Admiralty for decision in consequence of the consent and request of all parties, &c.—REPORTER'S NOTE.

parties proceeded against. On the whole, I am of opinion that the English seamen are entitled to redress here; that these goods being matter of prize, even that part which had been landed, are subject to the jurisdiction of this Court, and I shall therefore overrule the protest."

That was a case of salvage on recapture when part of the salvaged cargo had been landed before the suit was instituted. Nothing in these cases, in my opinion, precludes the claim of the Crown in the present case.

Counsel for the German company also cited *THE HOFFNUNG* (6 C. Rob. 383; 1 Eng. P.C. 583) and *THE CHARLOTTE* (6 C. Rob. 386*n.*; 1 Eng. P.C. 585*n.*). The former was a case where, before seizure at the outbreak of hostilities, a part of the cargo had already been sold, and had been applied to the reparation of the vessel also before the seizure. The decision was that the captors could not claim average against the ship on account of the cargo so sold and applied. In the latter case the Court held that the proceeds of the part of the cargo already sold and delivered before it was even subject to seizure were not amenable to the jurisdiction of the Prize Court. It does not seem to me that either of these decisions can assist the claim of the German owners in the present case.

The other authority referred to was the well-known case of *BROWN v. THE UNITED STATES* (8 Cranch (Amer.), 110). In the District Court it was tried before Story, J., and is there reported as *THE CARGO OF THE SHIP EMULOUS* [1813] (1 Gall. (Amer.) 563). Story, J., also, sat in the Supreme Court on the appeal, and was one of the dissenting Judges. It is an interesting and illuminating case. The subject-matter was some timber which had been British property carried on an American ship, and which had been landed and put into a salt-water creek (which was not navigable, although the tide ebbed and flowed there), some twelve months before the seizure. About five months after it was landed it had been sold to the claimant Brown. It was in that position at the commencement of hostilities between the United States and Great Britain, and was seized afterwards. The ultimate and actual decision was that the property was on land, and was found on land at the commencement of hostilities, and that therefore it could not be condemned as enemy property without a legislative Act of Congress authorising its confiscation.

Of course, the decision is not binding in this Court. It would be open to this Court, if it deemed fit, to accept the guidance of the judgment of Story, J., who was so great an authority on prize law, even in preference to that of the very eminent Chief Justice. But I refrain from attempting to weigh the judgments. I only desire to emphasise the fact that the ground of the decision was that the property was not only found in fact to be seized on land; but especially that it was found within the territory of the belligerent at the commencement of hostilities; and, further, to call attention to what Story, J., conceived to be conceded by the Supreme Court if the property in question had been brought to where it was after war had broken out. This learned Judge said (8 Cranch (Amer.), at p. 161): "The opinion of my brethren seems to admit that the effect of hostilities is to confer all the rights which war confers; and it seems tacitly to concede, that, by virtue of the declaration of war, the executive would have a right to seize enemies' property which should actually come within our territory during the war." And (p. 154) he said that he understood the opinion of the Court to proceed upon the tacit acknowledgment that the Executive might seize and confiscate property (and I think he intended to include the property in question) if it had come into the country since the war.

I have now dealt with the cases which were cited. There are a few others to which I think it well to call attention.

One, called 1253 BAGS OF RICE, 103 CASKS OF RICE [1862] (Blatchford's Cases in Prize, 211), arising in the course of the American Civil War, was heard in prize in the District Court of New York. As I have just been dealing with the case of *BROWN v. THE UNITED STATES* (8 Cranch (Amer.), 110), I will first take from the judgment of Mr. Justice Betts a passage to shew what he considered to be the effect of that decision: "The decision upon the merits in *BROWN v. THE UNITED STATES* (8 Cranch (Amer.), 110), went upon the principle that the enemy property there seized was landed in this country before the war commenced between England and the United States, and that it was not liable to capture as prize, in the absence of positive law authorizing its seizure. The majority of the court who adopted that doctrine did not controvert the decision of the circuit court, declaring the suit to be of a prize character,

nor the historical and juridical fact that the practice of the United States courts is governed by the rules of admiralty law disclosed in the English reports. . . . It is very clear that in England the prize jurisdiction does not depend upon locality, but upon the subject-matter." The part of the case before Mr. Justice Betts which, though not strictly relevant, may help to throw some light upon the case now before me, is that which dealt with the "103 casks of rice." This cargo was not water-borne when seized, but was found stored in a warehouse in the enemy's country, and captured there by launches of a United States vessel. The question specially presented was whether the seizure on land was in law a maritime capture. It was held in that case, dependent no doubt upon its particular facts, that it was.

Another case is *THE THALIA* [1905] (*Russian and Japanese Prize Cases*, vol. 2, p. 116), in the Supreme Court of Prize in Japan. There a vessel belonging to Russian citizens was in itself a sort of cargo, because it had been laden upon another vessel, and so conveyed to a place near a dry dock in Japan to undergo repairs. It was placed on dry land near the repairing dock, and was there before the outbreak of hostilities. It was held to be, by reason of its character, a maritime prize, and subject to capture and confiscation.

I now, finally, desire to refer to some cases in this country which are not reported. They are noted in a most valuable and elaborate report in MS., which was drawn up by Mr. Rothery, a former Registrar of the Court of Admiralty during the Crimean war, and presented to one of our public departments in 1857. It represents two or three years' labour, and shews scrupulous care and great skill and learning. Its chief object was to ascertain how and to what extent captors had been rewarded for prizes taken. I could wish it were accessible in print to those interested in these subjects. That also is the opinion of Mr. Roscoe, the Registrar, through whose kindness I have become acquainted with it. In perusing it, I have come across the following cases of interest bearing upon the question now before the Court.

One related to a seizure effected at Ramsgate. The following is the extract from the MS. report: "It is that of the French vessel *Marie Anne* (Warrant No. 97). It appears from the King's Proctor's report in this case, bearing date February 26,

1805 (Treasury No. 1028), that on the breaking out of hostilities with France on May 16, 1803, John Friend, of Ramsgate, in the county of Kent, shipbuilder, having obtained information that a ship called the *Marie Anne* (then under repair in his own yard at Ramsgate) and certain parts of the cargo thereof, which had been landed and deposited in warehouses, were French property, seized the said ship and goods, as being the property of His Majesty's enemies, and with great difficulty obtained the papers and documents belonging to the ship and cargo from the merchants, in whose hands the same had been deposited, and took the master and other necessary witnesses to Deal, and caused them to undergo their examinations before the proper commissioners there, in order that the said ship and goods might be legally brought to adjudication. The result of these proceedings was that the ship and cargo were condemned as droits of Admiralty, and after payment of all expenses realised the sum of 2,667*l.* 1*s.* 8*d.* Upon an application being subsequently made for a grant, the King's Proctor reported that the grant of 400*l.* would be a liberal reward to Mr. John Friend for his services. Accordingly a grant to that extent was made, thus giving the seizer somewhat less than one-sixth of the proceeds." This is a case directly in point, as the cargo seized had been landed and deposited in warehouses.

The next case is *THE BERLIN JOHANNES* (Warrant No. 77). The extract is as follows: "It appears from the warrant in this case that the Marshal of the Admiralty had received information that the *Berlin Johannes*, then lying in the river Thames, which had arrived from Rotterdam with a cargo from Geneva, was enemy's property. He accordingly seized her, but at that time the greater part of the cargo had been discharged. Proceedings were commenced in the Court of Admiralty, when it transpired that the ship had formerly belonged to British subjects, and was accordingly restored to them on payment to the Marshal of one-sixth part of the value, that being the usual proportion paid to non-commissioned persons in case of recapture. The cargo, however, proved to be enemy's property, and was accordingly condemned as droits of Admiralty, and on being sold realised the sum of 504*l.* 9*s.* 7*d.* This warrant grants to the Marshal one-sixth of the proceeds 'as an encouragement for his vigilance and attention.'"



I have tried to obtain, but have not yet succeeded in doing so, the original papers in this case, in order to see whether the part of the cargo which had been discharged was condemned. I see no reason to doubt that it was, because, if any distinction was made between the part discharged and the part not discharged, that would almost certainly have been mentioned in the report.<sup>2</sup>

The next case is that of *THE VENUS* (Warrants Nos. 220 and 221). The extract from the report is as follows: "It appears from the warrants in this case that William Davies, the master of the British vessel *Venus*, whilst bound on a voyage to Hamburg with a cargo, which he had taken on board at Genoa and other ports, received information that war had broken out between France and England, and he accordingly put into the port of Plymouth, not only for the safety of his own vessel, but also to ascertain the nature of the cargo which he had on board, and which he believed to be French. He accordingly communicated his suspicions to George Eastlake, the receiver of Admiralty droits at Plymouth, who ordered the same to be seized. The result was that the ship and a considerable part of the cargo were restored, but the remainder of the cargo, proving to be enemy's property, was condemned as droits of Admiralty, and realised the sum of 531*l.* 18*s.* 8*d.* after payment of all expenses. On an application the Crown granted 50 guineas as a reward to the master of the *Venus* in consideration of his conduct in the matter, and 100 guineas to Mr. Eastlake in consideration of his having seized the ship and cargo at his own risk. The two grants together were between a third and a fourth of the net proceeds." I have to set out this case because, in the action of the master in bringing

(2) Mr. Rothery's Note appears to refer to *THE BERLIN* (Johannes Poort, Master), seized as prize in the river Thames on April 4, 1799, under the circumstances stated. It seems that only the goods on board the ship were condemned. A note of the decree is as follows: "*Gostling* brought in a Schedule of the Goods on board the said Ship at the Time of the Seizure, and no Claim having been given for the same, the Judge at Petition of *Gostling*, and on Motion by Counsel having heard the Proofs read by further Interlocutory Decree, pronounced the said Goods Schedules to have belonged, at the Time of the Seizure thereof, to Enemies of the Crown of Great Britain; and . . . condemned the same. . . ." See the Appellants' Case in *THE BERLIN*, on Appeal to the Lords Commissioners of Appeals in Prize Causes, printed in *Appeal Cases in Prize Causes, 1802-4*, p. 227, in the Inner Temple Library.—REPORTER'S NOTE.

his vessel into a British port, there is a close resemblance to the course of events resulting in the steamship *Roumanian* being diverted to Dartmouth and Purfleet, and also because it shews that enemy cargoes in British vessels were condemned. Counsel for the claimants intimated that he would have argued that in such a case the goods were not confiscable, but for the fact that I have in previous cases in this Court decided the contrary.

There is one other matter to which I wish to refer before stating my conclusion. It may be suggested that even if the oil in the tanks were confiscable as enemy property on land it is not the subject of prize within the jurisdiction of the Prize Court. While I think it is, I cannot see what advantages would accrue to the German company, especially in these days when all the Divisions are parts of one High Court, if the questions arising were admitted (if they could be admitted) to be decided in a common law or other Court in this country. To adopt a metaphor employed by Lord Stowell, it would be but to make a change of postures on an uneasy bed.

Applying what appears to me to be the principles of the law of nations to the facts of the present case, I have after full consideration come to the conclusion that the whole of the oil cargo of the *Roumanian* was maritime prize, subject to seizure as and where it was, both on board and in the tanks; that the case falls within the jurisdiction of this Court; that the portion in the tanks was seizable even if it has to be regarded strictly as being on land as distinguished from the port; but also that the tanks were within the port; and that the oil was seized, and lawfully seized, by the Customs officers on behalf of the Crown, and must be condemned to the Crown as prize in the Crown's rights to droits of Admiralty. I decide, therefore, against the claim of the German company and decree condemnation of the whole cargo.

There remain the money claims of the steamship company and of the tank company. The legal liability of the captors for freight is not to be decided in this case, but the Attorney-General for the Crown, without admitting liability, assented to the payment of what is determined to be reasonable.

(1) As to the claim for freight, by consent the Crown will pay what is decided by the Registrar and merchants to be the reasonable amount, to be determined on the principle of *pro rata*

*itineris*. The question of amount is, accordingly referred to the Registrar and merchants.

(2) As to the charges for landing and storing in the tanks, the Crown also assents to payment, either to the shipping company or to the tank company (whichever may be entitled), of the proper sums, to be ascertained also by reference to the Registrar and merchants.

(3) The claims for demurrage at Dartmouth and for coal consumed are disallowed.

(4) The Port of London dues are to be paid by the Crown.

(5) The claim for inspecting cargo is assented to by the Crown, and is allowed.

(6) The claim for interest is disallowed.

(7) The claims for insurance stand over. Liberty to the claimants to apply in respect of them.

As to the suggestion made by the Attorney-General that the amount of the claims which are allowed should not be paid over till further order, I see no reason why the amounts when ascertained should not be at once paid to the claimants upon the understanding, or upon a guaranteed undertaking if applied for by the Crown, that no part of the money should be handed over to enemy subjects. Liberty to the Crown to apply as to this, and leave, if necessary, to the claimants to appeal.

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*Solicitors*—Treasury Solicitor; Ince, Colt, Ince & Roscoe.

[*Reported by Arthur Pritchard, Esq., Barrister-at-Law.*]

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[IN THE EXCHEQUER COURT OF CANADA. IN PRIZE.]

CASSELS, J. (PRESIDENT). Dec. 15, 1914.

#### THE BELLAS.

*Enemy Ship—Loading in Belligerent Port—Detention—Days of Grace—Non-application to German Vessels—Order of Governor-General in Council—Invalid Transfer—History of Prize Court in Canada.*

A German barque, loading cargo in a Canadian port at the outbreak of war between Great Britain and Germany, was seized as prize by the Collector of Customs on August 5, 1914. By an Order of the Governor-General in Council of the same date it was

*provided (inter alia) that if information was received by H.M. Government not later than midnight on August 7 that the treatment of British merchant ships, and their cargoes, in an enemy port was not less favourable than the treatment accorded to enemy merchant ships under the Order (art. 2), enemy merchant ships in Canadian ports at the outbreak of hostilities should be allowed days of grace in which to load or unload their cargoes and depart (art. 3). In the event of this information not being received the Order provided that such ships, together with their cargoes, should be liable to capture (art. 9). The information was not received, and the Secretary of State for Foreign Affairs notified the Lords Commissioners of the Admiralty that articles 3 to 8 of the Order would not come into operation as regards Germany.*

*Counsel for the Crown asked for an order for detention, as in THE CHILE (ante, p. 1; [1914] P. 212):—Held, that the ship and her cargo must be detained until further order.*

*The claim of a Portuguese subject who alleged that the ship had been transferred to him whilst she was on the high seas, and before the outbreak of war, was dismissed with costs, there being no proper bill of sale to complete the transfer before the war, and no registration under the Portuguese flag until a date subsequent to the seizure of the vessel.*

This was an action for the detention as enemy property of the German barque *Bellas*, seized at Port Rimouski whilst loading a cargo of lumber the day after the outbreak of war between Great Britain and Germany. A claim was entered on behalf of a Portuguese subject, Dr. Orlando de Mello do Rego, who alleged that the vessel had been legally transferred to him before the outbreak of hostilities, and whilst she was on the high seas.

The facts fully appear in the statement of counsel for the Crown.

*E. L. Newcombe, K.C.* (Deputy Minister of Justice), for the Crown.

*A. C. Hill*, for the claimant.

*Newcombe, K.C.*, before entering on the particulars of the case, this being the first occasion for one hundred years in which a Prize Court had sat in British North America, referred to the history of the Prize Court in Canada. Quoting from the

prefatory note by the author in *Stewart's Reports of the Admiralty Decisions of the Province of Nova Scotia* (Dr. Croke's judgments), published in 1813, he said that, "The court, in which these decisions were given, was established upon its present basis in the year 1801. The irregularities which had prevailed in the Vice-Admiralty courts having given occasion for complaint, both at home and abroad, at length drew the attention of His Majesty's Ministers, and of the Legislature . . . and His Majesty, by a letter of Lord Grenville, dated the 22nd day of January, 1801, directed the Lords Commissioners of the Admiralty, to revoke the prize commissions which had been granted to the Vice-Admiralty Courts in the West Indies, and in the colonies upon the American continent, except Jamaica and Martinico. An Act of Parliament was then passed, in July, 1801 (41 Geo. 3. c. 96), by which 'each and every of the Vice-Admiralty Courts established in any two of the islands in the West Indies, and at Halifax in America, were empowered to issue their process to any other of His Majesty's colonies or territories in the West Indies or America, including therein the Bahamas and Bermuda islands, as if such court was established in the island, colony, or territory, within which its functions were to be exercised.'"

Alexander Croke, LL.D., was offered the first appointment under the new establishment, and was the immediate predecessor of his present Lordship in point of the exercise of prize jurisdiction in Canada, which, originally exercised under a Commission of the Admiralty, by the Vice-Admiralty Court, was continued with certain modifications of the procedure, until the Prize Courts Act of 1894 (57 & 58 Vict. c. 39). Counsel referred to section 2 of the Act, and said that it was under the authority of this statute that the letters patent of July 10, 1899, and the Admiralty warrant of April 10, 1900, were issued. They were directed to the Commissioners for Executing the Office of Lord High Admiral of the United Kingdom, and pursuant thereto the Commissioners by warrant, under their hand and seal of office of April 10, 1900, authorised the Exchequer Court of Canada to exercise prize jurisdiction.

Section 3, sub-section 1 of the Prize Courts Act, 1894, provided that "Her Majesty the Queen in Council may make rules of court for regulating, subject to the provisions of the

Naval Prize Act, 1864, and this Act, the procedure and practice of prize courts within the meaning of that Act, . . ." and under this provision His Majesty by Order in Council of August 6, 1914, approved the prize rules of the Court known as the Prize Rules, 1914. Order XLVI. provided that "the Rules shall not come into operation in any court in a British possession outside the United Kingdom until they are proclaimed in the Possession by the Governor thereof."

By a proclamation dated August 22, and published in the *Canada Gazette* on the 29th, it was declared that the Prize Rules, 1914, should come into force and effect upon the date of the proclamation. In this way the Court and the procedure of the Court were established.

On August 5 an Order of the Governor-General in Council was passed concerning the days of grace to be allowed to German ships in Canadian ports at the outbreak of war to leave Canada, pursuant to the convention relative to the *status* of enemy merchant ships at the outbreak of hostilities, signed at The Hague on October 18, 1907. That Order in Council of August 5 corresponded substantially with the Imperial Order in Council of August 4.

The Order of the Governor-General in Council provided as follows:

"1. From and after the publication of this Order, no enemy merchant ship shall be allowed to depart, except in accordance with the provisions of this Order, from any Canadian port.

"2. In the event of the Governor-General being informed by His Majesty's Government that information had reached His Majesty's Government, not later than midnight on Friday, the seventh day of August, that the treatment accorded to British merchant ships and their cargoes which at the date of the outbreak of hostilities were in the ports of the enemy or which subsequently entered them is not less favourable than the treatment accorded to enemy merchant ships by Articles 3 to 7 of this Order, the Secretary of State for External Affairs shall notify the Minister of Customs and the Minister of the Naval Service accordingly, and public notice thereof shall forthwith be given in the *Canada Gazette*, and Articles 3 to 8 of this Order shall thereupon come into full force and effect,

"3. Subject to the provisions of this Order, enemy merchant ships which (i) At the date of the outbreak of hostilities were in any port in which this Order applies; or (ii) Cleared from their last port before the declaration of war, and, after the outbreak of hostilities, enter a port to which this Order applies with no knowledge of the war; shall be allowed up till midnight (Greenwich mean time) on Friday the 14th day of August, 1914, for loading or unloading their cargoes and for departing from such port. Provided that such vessels shall not be allowed to ship any contraband of war, and any contraband of war already shipped on such vessels must be discharged."

Article 9 read as follows: "9. If no information reaches His Majesty's Government within the time allowed by it for the receipt of such information to the effect that the treatment accorded to British merchant ships and their cargoes which were in the ports of the enemy at the date of the outbreak of hostilities, or which subsequently entered them, is, in its opinion, not less favourable than that accorded to enemy merchant ships by Articles 3 to 8 of this Order, every enemy merchant ship which, on the outbreak of hostilities, was in any port to which this Order applies and also every enemy ship which cleared from its last port before the declaration of war, but which, with no knowledge of the war enters a port to which this Order applies, shall, together with the cargo on board thereof, be liable to capture, and shall be brought before the Prize Court forthwith for adjudication."

In a despatch dated August 19, 1914, from the Secretary of State for the Colonies to the Governor-General, it was stated that at midnight, August 7, the Secretary of State for Foreign Affairs formally notified the Lords Commissioners of the Admiralty that articles 3 to 8 of the Order in Council would not come into operation as regards Germany.

*Newcombe, K.C.*, then turned to the facts. He said that the barque *Bellas* was a German ship of 930.94 tons, of the port of Hamburg. This ship's papers—namely, the muster roll, the ship's certificate, and the certificate of admeasurement—shewed beyond any question the German nationality of the vessel. He offered these papers in evidence. They were produced under the affidavit of the Collector of Customs at Quebec.

At the time of seizure the *Bellas* had on board part of a cargo of lumber, loading not having been completed when war

broke out on August 4. She was then at Rimouski. Notice of detention was given to the captain on August 7, and on August 10 the vessel was handed over to Commander Atwood, R.N., to be towed to Quebec City. She was there delivered into the charge of the Collector of Customs.

The writ was issued on September 16, 1914, against the ship and cargo, "for the condemnation thereof as good and lawful prize, and droits and perquisites of us in our office of Admiralty," directed to "the owners and parties interested in the ship *Bellas* of the port of Hamburg, in the German Empire, and the goods laden therein, seized and taken of prize by our officers of customs at the port of Quebec." It was served on September 22.

On September 28 a notice of appearance was entered for one Orlando de Mello do Rego, of Lisbon, claiming to be the owner of the ship, and a document had been served on him (Mr. Newcombe) as the proper officer of the Crown (but by what authority he was not aware), which purported to be an affidavit by the master of the *Bellas*.

On November 21 an order for pleadings was made. In pursuance of that a petition was filed on behalf of the Crown shewing that the *Bellas* was a German vessel; that she was seized by His Majesty's Collector of Customs on August 5, 1914; and that she was good and lawful prize as *droit*, and perquisite of Admiralty.

Messrs. Taschereau, Roy, Cannon, Parent, and Fitzpatrick, attorneys at Quebec, filed what was called a statement of defence on behalf of Orlando de Mello do Rego, in which they stated that the *Bellas* was not a German vessel at the time of seizure. She "was owned by a German firm known as J. Wimmer & Co. previous to the date of the 3rd July last (1914), but at the said date the property of the vessel was transferred to the said Orlando de Mello do Rego according to a legal sale, as appears by a letter from the said J. Wimmer & Co. to the said Orlando de Mello do Rego dated 3rd of July, 1914. The vessel was on the Atlantic Ocean at the time of the sale, having sailed from the Port of Oporto, Portugal, on the 24th of June, 1914, on her usual voyage to Rimouski, and only reached the Port of Rimouski on the 29th of July, 1914. The sale above mentioned to the said Orlando de Mello do Rego, who is a Portuguese



subject, is a *bona fide* sale. Wherefore it is respectfully claimed that the said vessel should be released."

The ship was established by her papers to be a German ship, and flying the German flag; and the claim on behalf of this Portuguese subject should be disallowed. None of the essentials to make a valid transfer had been alleged, and there should be an order for the detention of the ship, and for the dismissal with costs of the claim of the alleged Portuguese owner.

[CASSELS, J.—By referring to paragraph 4 of the defence you will observe that the vessel was transferred to Dr. Orlando de Mello do Rego "according to a legal sale of same, as appears by a letter from J. Wimmer & Co. to the claimant dated 3rd of July, 1914." That letter goes in as part of the defence, otherwise it would not be intelligible; and by that letter there appears to be no transfer at all.]

[The Collector of Customs at Quebec was called to depose to the facts with regard to the detention of the *Bellas*.]

Hill, for the claimant, called Captain Bollen, the commander of the *Bellas*, and put in various telegrams and a letter from the claimant to the Portuguese Consul at Quebec, in which it was stated that the contract of sale was concluded on June 29, and the *Bellas* remained from that date for account of the present owner, Dr. Orlando de Mello do Rego. "The nationalizing and enregistering under Portuguese flag of the *Bellas* was authorized in a meeting of the Council of Ministers of Portugal on the 7th of October of the present year and in conformity with the law."

[CASSELS, J.—He had not the right to fly the Portuguese flag until October 7.]

That cannot be disputed. If an order is made it should follow the order in *THE CHILE* (*ante*, p. 1; [1914] P. 212). The claimant will be satisfied if the vessel be detained, and not condemned as prize of war.

CASSELS, J.—Both under the old authorities and under the decisions of our own Courts the transfer must be perfected before declaration of war by a proper bill of sale. Here there is no claim put forward that would entitle this defendant, a Portuguese subject, to have this ship handed over. I do not think it is necessary for me to reserve judgment; I have looked into the subject very thoroughly. I think the Portuguese claim

must be dismissed with costs, and there will be an order against the German owners that the ship and her cargo be detained by the Marshal until further order of the Court, as in *THE CHILE* (*ante*, p. 1; [1914] P. 212).

[*Reported by E. C. Trehern, Esq., Barrister-at-Law.*

[IN H.B.M. PRIZE COURT FOR EGYPT.\*]

(*Sitting at Alexandria.*)

CATOR, P., and GRAIN, J. Jan. 6, 1915.

### THE GUTENFELS.

*Enemy Ship—Seizure in Suez Canal Port—Improper Use of Port—Status of Port Said—Suez Canal Convention, 1888—Décision of S.E. the Regent, of August 5, 1914—Hague Conference, 1907, Convention No. VI.—Position of Egypt—Circumstances of Capture—Right of Alien Enemy to Appear in Prize Proceedings.*

*A Prize Court is entitled to look behind the actual circumstances of the seizure by the British captor, and will examine the whole of the events which led up to the capture. The Suez Canal Convention, 1888, does not protect from capture vessels which are using the ports of the Canal not for purposes of passage, but as places of refuge.*

*Ports Said and Suez are to be regarded as ordinary Egyptian ports when they are not used as ports of the Canal, and vessels*

\* This Court was constituted under the provisions of the Prize Courts (Egypt, Zanzibar, and Cyprus) Act, 1914 (4 & 5 Geo. 5. c. 79), which provides that "if His Majesty is pleased to confer jurisdiction in matters of prize on . . . H.B.M. Supreme Court for the Dominions of the Sublime Porte in Egypt, the Court shall, in respect of the present war, have under the Naval Prize Court Acts, 1864 to 1914, the jurisdiction thereby conferred on a Vice-Admiralty Prize Court, and those Acts and any Orders in Council made thereunder shall apply accordingly . . ."; and by an Order in Council of September 30, 1914, a Commission issued "authorizing the Commissioners for executing the office of Lord High Admiral to will and require H.B.M. Supreme Court for the Dominions of the Sublime Porte in Egypt to judicially proceed upon . . . matters of prize . . . and according to the course of Admiralty and the Law of Nations . . . to adjudicate and condemn all such ships, vessels, and goods as shall belong to the German Empire or to the Dual Monarchy of Austria-Hungary . . ."—EDITOR.

lying up in them for refuge are to be treated as if they were in an Egyptian harbour.

Since the outbreak of hostilities between Great Britain and Germany, Egypt cannot be regarded as neutral territory, and an enemy vessel which has been boarded by Egyptian officials and detained, and at the instigation of Great Britain is then escorted out to sea and there seized as prize by a British cruiser, must be considered to have been captured in a belligerent port.

An alien enemy is entitled to appear in a Prize Court to argue that his vessel is protected from capture by the rules of International Law or an International Convention.

[NOTE.—The findings of the Court relate to a period before November 5, when war was declared between Great Britain and Turkey. According to British law, the suzerainty of Turkey terminated on December 18, 1914, when Egypt was constituted a British Protectorate.]

Cause for condemnation of a vessel as prize.

The *Gutenfels* was a German steamship of 5,528 tons gross, belonging to the Hansa Line. She arrived at Port Said on August 5, 1914, and, although possibly no safe conduct would have been given to her, she was at liberty to quit the port at any time during a period of two months. On October 13 she was boarded by an officer of the Egyptian Army, and her master was informed that the Egyptian Government had taken possession of her, and that a new master and crew would be sent on board. On October 16, with the Egyptian authorities still on board, she proceeded to sea, and when three or four miles out was formally seized by H.M.S. *Warrior* and brought to Alexandria.

Arthur Preston (*H.B.M. Procurator-General for Egypt*), for the Crown.

G. A. W. Booth, for the claimants; the owners of the vessel.

CATOR, P.—A preliminary question of great importance has been raised in this case. It is one that relates not only to ships already brought before the consideration of the Court, but will or may affect every case in the present cause list.

We are called upon to decide whether we shall observe the old rule that (with certain limited exceptions) no alien enemy can be heard in a British Prize Court, or whether we shall admit any, and if so what, relaxations to it, especially in view of modern sentiment as expressed in the Hague Conventions.

A similar question has already engaged the attention of the English Prize Court. In the case of *THE MÖWE* (*ante*, p. 60; [1915] P. 1) the President of that Court has dealt exhaustively with the law relating to an enemy's right of appearance, and has reviewed the authorities in detail.

Sir Samuel Evans comes to the conclusion (in which I may say that I respectfully agree) that, according to the principles laid down by Lord Stowell and Dr. Lushington, no enemy would have been allowed to appear in Court and say, "True I am an alien enemy and must submit to condemnation, but by virtue of the Hague Convention I claim a milder penalty than confiscation of my property."

Having reached this conclusion, Sir Samuel discusses the right of the Court to modify the old rule, and states as his opinion that the Court has an inherent power of regulating and prescribing its own practice unless fettered by enactment; that he is not so fettered; that the existence of the Hague Conventions has created new conditions which demand new rules of practice; and that in the exercise of his discretion he will admit any alien enemy to appear and claim any protection which such enemy thinks that those Conventions afford him.

H.M. Procurator-General is willing that we should accord an alien enemy similar liberty in this Court, but contests our power to make any further extension. He asks us to say that it is only by virtue of the fact that the Crown has by Order in Council announced its intention to be bound by the Hague Conventions that the enemy can take advantage of them, inasmuch as that Order is in the nature of a licence which divests the enemy of his alien character and thereby brings him within the recognised exceptions to the old rule, and that the English Court was wrong in claiming a general power to relax the rule.

I cannot accede to this contention. I take the same view as the President of the English Court. I consider that the rule is one of practice which it is open to the Court to vary, not indeed capriciously, but for good cause. And I think that it is not the right but the duty of the Court so to alter its practice from time to time as to reflect the changing conditions of civilisation that it has to serve. Now there can be no doubt that the general attitude of mind and conditions of thought of civilised mankind has greatly altered during the last hundred years, and an endeavour

has been made to formulate this changed opinion in the various International Conventions that have been signed at Berne, the Hague, and elsewhere and it is just and right that the milder views of the present generation should find an echo in the procedure of our Prize Courts.

In my opinion, the rule that forbids an alien enemy to appear on behalf of his ship or cargo is a barbarous rule which runs counter to all sense of natural justice. It is strange to find it embedded in the practice of any English Court. The rule, if I mistake not, did not exist in earlier times. It is said that Sir Leoline Jenkins, a seventeenth-century Judge who left a traditionary reputation for wisdom and enlightenment, considered that it was inequitable to condemn an enemy's ship without hearing what the owner might have to say in defence of his property.

If it is right that we should insist upon hearing a man in his own defence in those Courts where the parties are of one nation, and the Judge may be expected to be quite indifferent as to which suitor should succeed, it seems to me to be still more important that the enemy party should be heard in a Prize Court when the Crown claims condemnation of his ship and the Judge's sympathies must be supposed to be in favour of his own country.

It is much to be regretted that this question did not occupy the attention of the Hague Conference. I have little doubt what the opinion of the Conference would have been, and feel sure that most of the delegates would have been surprised that in a British Prize Court the owner of captured property has no right to present his case against the Crown if he be an alien enemy. There are not wanting writers on International Law who complain of the rule. For instance, Mr. Ernest Nys, a distinguished Belgian legist, mentions it as one which in ancient times was universal, but says that at the present day "two countries," and I understand him to mean two alone, "Great Britain and the United States, continue to assert its legality, and there even exist writers on jurisprudence who defend this out of date policy"—*Le Droit International*, par Ernest Nys, 1906, vol. iii. p. 150.

The fact is that the rule is a bad rule, much more to be honoured in the breach than in the observance; and if we must acknowledge ourselves to be so far fettered by the dead hand of outworn precedent as to recognise its continued existence, I am, at any rate, determined to permit all such breaches of it as

my sense of equity and fair dealing towards the enemy may demand.

For the present it is enough to say that we have decided to allow an enemy to raise any defence founded upon the Hague Conventions, as has been done in the English Prize Court, and to extend that indulgence to any enemy who bases his claim upon the terms of any Conventions relating to the Suez Canal, or upon the special relations in which Egypt stands to the British Government.

The ground must be set out in the affidavit which has to be filed by an alien in accordance with the provisions of Order III. rule 5, of the Prize Court Rules.

Having disposed of the preliminary question, I proceed to consider the merits of the case before us.

The s.s. *Gutenfels* is a German ship from Bremen, belonging to the Hansa Line. She is 5,528 tons gross and 3,557 tons net register, and is provided with wireless telegraphic apparatus. According to the affidavit of the master, she left Antwerp on July 24, 1914, for a voyage to Bombay and Karachi with a general cargo, and arrived at Port Said on the afternoon of August 5 without having made any intermediate call.

The master states that up to the time of arrival he was ignorant that war had broken out between Germany and Great Britain. According to his testimony, he was informed by his agents on reaching Port Said that he could not proceed, and he moored his ship out of the way of traffic in accordance with instructions. The following statement of subsequent events is that contained in the master's affidavit, and is admitted to be substantially correct. On the day of his arrival he was boarded by the Captain of the Port and ordered to take down the antennæ of his wireless apparatus, which were then removed, and thenceforward he lay at his moorings unmolested until October 13, but his position was shifted once by the Canal authorities. On the afternoon of October 13 an officer of the Egyptian Army boarded his ship and placed soldiers on guard, and later in the day the Captain of the Port came on board with an officer of the Army of Occupation, and the master was informed that the Egyptian Government had taken the ship and that no one must leave her. He was told that he must get up steam, and that a new captain and crew would be sent on board, as was subsequently done, and was informed that he had no

command, but could assist if he liked. The Egyptian officer and soldiers remained on board until the ship reached Alexandria a few days later. On the morning of October 16 the *Gutenfels* left Port Said and proceeded to sea. Some three or four miles outside the port they encountered H.M.S. *Warrior*, and a British naval officer boarded the *Gutenfels* and stated that he had been ordered to seize her as prize and bring her to Alexandria. The officer seized the ship's papers and the *Gutenfels* reached Alexandria on October 17.

On these facts the Crown asks us to condemn the ship and order her sale as lawful prize. The Procurator contends, in the first place, that we cannot go behind the seizure of the ship by H.M.S. *Warrior*; and if this contention were valid there would of course be no answer to the claim of the Crown. It would be the simple case of an enemy ship, cognisant of the war, encountered and captured on the high seas. But my brother and I are both of opinion that this contention has no substance. Doubtless, if Port Said had been a port of an independent neutral Power, which for some reason had forced the *Gutenfels* to put to sea, the reason for such action would not have concerned us and we should not look beyond the capture by the British man-of-war. But when, as in this case, the ship has been driven out of the harbour at British instigation, as all the evidence indicates, and as is avowed by the notification dated October 23, 1914, sent by the British Government to the representatives of foreign maritime Powers in London, and published in the *Gazette* of October 27, the position is altered. There is no question here of the infraction of the sovereignty of a neutral Power. We must treat the case as if it were that of a German ship anchored in Liverpool or Cardiff at the outbreak of hostilities, boarded there by officers of the Crown, taken by them beyond the territorial limits of Great Britain, and there handed over by arrangement to a British man-of-war. To state the case in these terms is to indicate its hollowness. What Court, with any self-respect, would decline to go behind the so-called capture on the high seas? I want no authority to justify me in brushing aside such sophistries, though authority on the subject is not lacking. The case of *TWEE GEBROEDERS* (No. 1) ([1800] 3 C. Rob. 162; 1 Eng. P.C. 286) proves conclusively that it is the duty of a British Prize Court to examine all the circumstances that attend or lead up to the capture.

Having established this point in their favour, the owners pray restoration of their vessel on the ground that Port Said is a neutral port, whose neutrality has been guaranteed by the Suez Canal Convention; and it becomes our duty to consider what is the position of enemy ships which have taken refuge in the port. Are they entitled to immunity from capture while lying at anchor having no intention to pass through the Canal; or does immunity only extend to them for such reasonable time as may be necessary to enable them to make a passage through it?

The Procurator did not give us any detailed history of the relations between the Canal company and the Egyptian Government, but he has put in a book published by the company, which contains all material documents on the subject up to the date of publication, 1911.

It contains a very full history of the company's dealings with the Government as disclosed by the various agreements concluded between the parties. In the first place the construction of the Canal had nothing international about it. It was a purely commercial bargain made between the Egyptian Government and the Canal company, and subsequently ratified by the Sultan of Turkey.

The company received a concession of ninety-nine years from the opening of the Canal, and the Egyptian Government granted the company very wide powers of independent control within the Canal limits, but carefully stipulated for the retention of all rights of sovereignty and police supervision. The first concession was dated November 30, 1854, followed by a second and more detailed concession dated January 5, 1856. Article 9 of the second concession provides for the appointment of a special official at the company's office to represent the interests of the Egyptian Government. All the questions incidental to the Canal are dealt with in detail, and by article 33 the Government stipulates for a share of 15 per cent. in the net profits of the undertaking. It is indeed nothing but a commercial contract on a large scale. The only article which has any international significance is article 14, which provides that the Canal and its dependent ports should, on payment of the established charges, be always open as a neutral passage to every merchant ship passing from one sea to the other without any distinction, exclusion, or preference of individuals or nationality; but so far as the Government and the company were concerned, they might



just as well have provided for preferential advantages for Egypt or any other nation. There follow in course of time a multitude of supplementary agreements relating to the company's work. As is well known, great difficulties arose in regard to finance. The Egyptian Government sold its interest in the profits of the Canal to a French company. Differences arose, which were referred for decision to the French Emperor as arbitrator. But throughout the whole of these negotiations and disputes, and down to the present time, the parties have dealt with the Canal as a commercial undertaking in which they two alone are interested. The concessions of January 30 and February 22, 1866, are noticeable in that they formally recognise the right of the Government to occupy any position or strategic point within the lands reserved for the construction of the Canal which the Government might deem to be necessary for the defence of the country, provided that no obstacle is caused to the navigation of the Canal, and similarly provide for the occupation by the Government within such limits of all available places needed for Government services, such as post offices, Customs houses, and barracks. The concession of February 22, 1866, deals with the extent of land to be conceded to the company. It recites (article 4) that to enable the company to carry out its objects land will be needed for all manners of purposes such as depots, workshops, ports, &c., and it declares (article 9) that the Canal and all its dependencies are to remain subject to the Egyptian police. I will not discuss all the conventions and agreements between the parties, but I think it pertinent to mention the Convention of October 1, 1902. The first part relates to the taking over by the Government of the company's railway line from Ismailia to Port Said, while the second part deals with the enlargement of the port at Port Said.

There is nothing in these agreements that can possibly give rights to third parties. The Government and the company between them are at perfect liberty to vary their contracts so as to exclude or prefer the ship of any nationality, and if the Egyptian Government were by exercise of force to exclude a ship from the Canal, although it might be an unfriendly act to the Power to which such ship belonged, I apprehend that the ship itself could not claim damages for the breach of any contractual right, although doubtless the company might do so for breach of its concession.

But there is another aspect of the question which has been brought about by the International Convention of October 29, 1888, guaranteeing the free use of the Suez Canal, and commonly referred to as the Suez Canal Convention. To this Convention all the great European Powers and the Sultan of Turkey were parties.

"Article 1 declares that:

"The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag. Consequently the High Contracting Parties agree not in any way to interfere with the free use of the Canal, in time of war as in time of peace. The Canal shall never be subjected to the exercise of the right of blockade."

Article 4, which is the special article upon which the claimants rely, reads as follows:

"The Maritime Canal remaining open in time of war as a free passage even to the ships of war of belligerents, according to Art. I. of the present treaty, the High Contracting Parties agree that no right of war shall be exercised, nor shall any act of hostility, or any act having for its object to obstruct the free navigation of the Canal, be committed in the Canal and its ports of access, nor within a radius of three marine miles from those ports, even though the Ottoman Empire should be one of the belligerent Powers"; and special provision is made as to the passage and victualling of vessels of war.

Article 8 directs that the agents in Egypt of the signatory Powers are to watch over the due execution of the treaty, and "In case of any event threatening the security or free passage of the Canal . . . they shall inform the Khedivial Government of the danger which they have perceived in order that the Government may take proper steps to insure the protection and the free use of the Canal." By article 9 the Egyptian Government is charged with the duty of ensuring the due execution of the treaty, but if not provided with sufficient means for the purpose shall call upon the Ottoman Government for assistance and notify the other signatories. The articles forbidding acts of war in or about the Canal are not to interfere with measures taken for the protection of the Canal, or measures taken by the Sultan of Turkey or the Khedive for securing, by their own forces, the defence of Egypt and the maintenance of public order. Article 13 expressly provides that, apart from the obligations contained in the treaty,

the sovereign rights of the Sultan and the Khedive are in no way affected.

In view of these provisions there is a grim touch of humour about the present situation, seeing that the Ottoman Government, under German direction, is at this moment seeking to destroy the Canal, while a German ship taken by the Egyptian Government asks in a British Prize Court for a declaration of release on the ground that the Canal precincts are absolutely inviolable.

The passages that I have cited are all that, in my opinion, are material to the issue. Can it be said that this Convention gives the right to any ship to shelter itself indefinitely, or at all, in the ports ancillary to the Canal because they happen to be within the limits of the operations of the Canal company? I think, not. In my opinion the sole object of the treaty, as expressed both in its preamble and operative articles, is to ensure a free and uninterrupted passage of the Canal at all times to all ships of all nations of the world; and if in the unlikely event of a German ship now entering Suez or Port Said and demanding a free passage, I think it would be the plain duty of the British Government (after taking proper precautions to prevent damage to the Canal itself) to allow such ship to pass through and sail out at the other end; and I have no reason to suppose that the British Government would fail in its duty. But that is the limit of its obligation; and if a ship enters Suez or Port Said without any intention of going through the Canal, or, being in either of those ports, abandons any intention it may have had of passing through, I am of opinion that she ceases to have any rights whatever under the Convention. The object of the Convention is to ensure a free passage through the Canal, and nothing else, and all prohibitions against acts of hostility within the Canal precincts are framed with that object and that alone; and I am satisfied that from the moment the *Gutenfels* abandoned her intention of passing through the Canal, which was in fact at the time when she entered Port Said, if not earlier, she ceased to enjoy any protection under the stipulations of the Convention, and thenceforward lay in Port Said upon exactly the same footing as if she had been in Alexandria or any other Egyptian port.

This finding brings us to the consideration of another branch of the case. In former days an enemy ship, found in harbour at the outbreak of hostilities, would have been confiscated almost as a matter of course, but in more recent times it has become

customary for belligerents on the outbreak of war to accord enemy ships a certain period, usually called days of grace, in which to clear from harbour and to reach a neutral port without fear of capture. The practice has not been uniform, but a longer or shorter period has been granted by most of the belligerents in the wars that have occurred during the last seventy years. The question of according days of grace was considered at the Hague Conference of 1907 and evoked much diversity of opinion. It was found impossible to agree upon any obligatory rule, and the Conference ultimately adopted a formula which amounts to no more than a recommendation that belligerents should allow enemy ships to clear and reach a neutral port in safety. Article 1 of the sixth Convention says that if a merchant ship of a belligerent Power finds itself on the outbreak of hostilities in an enemy port, or enters such a port in ignorance of hostilities, "it is desirable that it should be allowed to depart freely either immediately or after a sufficient term of grace, and to proceed direct, after being furnished with a passport, to its port of destination or such other port as shall be named for it." Article 2 declares that a ship which has been unable to leave the port within the days of grace cannot be confiscated, but may be detained until the conclusion of hostilities; and article 3 makes a similar provision in regard to ships captured at sea while in ignorance that war has broken out. The two articles are peremptory in form, but it is by no means clear that they are not dependent upon the words "It is desirable" contained in the first article. The point was adverted to but not disposed of in the case of *THE CHILE* (*ante*, p. 1; [1914] P. 212), heard in the English Prize Court on September 4, 1914; but I put aside this question for the moment, and will briefly examine what has actually taken place in regard to the *Gutenfels* and the other enemy ships which took refuge in Port Said.

The evidence consists mainly of the oral testimony given by Captain Trelawny, the Captain of the Port at Port Said, supplemented by sundry entries found in the ship's logs and the affidavits of the masters. He tells us that on August 5 he received instructions to disable all the wireless apparatus on the German ships. From August 5 to 13 it would seem that the Government was in some doubt as to how it would deal with the ships, and Captain Trelawny perhaps reflects their indecision, for he speaks of the ships being detained, but at the same time being

free to leave as far as he was concerned, and in re-examination states that no doubt any application for leave to depart would have been considered, but that no application was made.

On August 13 an interview took place between Mr. Rickmers, the German Consul and agent for the Hansa and several other German Lines, and Captain Trelawny, who informed Mr. Rickmers that four ships could proceed, but six would be detained, the four being under 5,000 and the remainder above 5,000 tons. On the following day, however, August 14, Captain Trelawny received further instructions from Mr. Ward Boyes, acting on behalf of the Egyptian Government. These were recorded by the witness in a memorandum which runs as follows:

“All merchant vessels of the belligerent Powers may be allowed free transit and clearance from the port under the conditions laid down Art. 20 of the Proclamation,—*Journal Officiel*, 6th August. If they desire to remain they are at liberty to do so qualified by text of same article. They may tranship cargo in part or in whole to any vessel under a neutral flag, said vessel, however, being liable to overhaul and capture if contraband of war is found on board. The above does not include the German steamer *Derfflinger*, which is a convertible cruiser and was detained for doing an unneutral act in the Canal,—using her wireless for communicating with the enemy.”

This was the official attitude; and Captain Trelawny says, “The only thing necessary before their (*i.e.* the ships’) departure was the ordinary clearance papers, and, as far as I am concerned, there was nothing else necessary”; and further on in his evidence Captain Trelawny says he is sure that he made it perfectly clear that ships over 5,000, as well as under 5,000 tons, were at liberty to leave.

On August 17 the *Rabenfels*, another Hansa Line steamer, was stopped by order of the General Officer Commanding troops from going through the Canal. It is to be noted that this officer represented the British Army of Occupation in Egypt, whereas Captain Trelawny is an Egyptian Government official. The next day an order was issued from Cairo that enemy ships were not to enter the Canal, though they might still pass out to sea into the Mediterranean. All these ships were free to leave the port, so far as Captain Trelawny was concerned, until October 13, when they were taken over by the Egyptian troops; and I pause a moment to call attention to the fact that the actual seizure was

made by the Egyptian authorities, although they were no doubt acting in concert with the British Navy.

It will be found that several of the ships at Port Said, including the *Gutenfels*, entered a statement in their logs on August 14 to the effect that Port Said had been declared neutral. This was no doubt in consequence of some misapprehension on the part of the masters or the German Consul, for Captain Trelawny says that he never stated that the port was neutral, though he may have acquiesced in such a statement as the word "neutrality" was in the air, and his own impression was that the port was neutral.

After this sketch of the course of events in Port Said, let us see what attitude the Egyptian Government adopted in its announcements to the public. This is to be found in the proclamation drawn up at a meeting of the Ministers on August 5, 1914, and published in the *Journal Officiel* on the following day.

Article 13 of this proclamation authorises the British naval and military forces to exercise all rights of war in Egyptian ports and territory, and declares that all ships captured in Egyptian territory may be brought before a British Prize Court. Article 14 declares that any German ship which may happen to be in an Egyptian port at the outbreak of hostilities, or may have left its last port before that date, and may in ignorance of the war enter an Egyptian port, shall be permitted to leave up to sunset on August 14, 1914, on giving such written engagements as may be required by the British naval authorities "in conformity with the provisions of chapter 3 of the Convention of 1907 relating to certain restrictions on the exercise of the right of capture in naval warfare."

Article 17 excepts from the privileges accorded by article 14, cable ships, liquid fuel ships, and vessels over 5,000 tons gross, or capable of steaming more than fourteen knots, as well as merchant ships convertible into vessels of war.

Article 20 declares that in regard to the ports of access of the Suez Canal the above-mentioned provisions shall be applied with the following modifications:

(a) That all ships will be permitted to pass through the Canal, provided that the passage through the Canal and the departure from the port of access be carried out in the usual way and without undue delay.

(b) That such ships will be permitted to take all coal and provisions required for their voyage.

(c) That all merchandise taken through the Canal may be discharged at the port of departure.

(d) That article 13 of the proclamation is to be read subject to the terms of the Suez Canal Convention of 1888.

The *Gutenfels*, being over 5,000 tons register, is not entitled to the indulgence offered by this proclamation; but it is in evidence, as I have already pointed out, that on August 14 permission was given to her to leave Port Said, and that it was open to her to avail herself of that permission up to October 13. Whether she would have been granted a safe conduct to a neutral port is doubtful. The proclamation makes no reference to safe conducts, though in view of the fact that they had been given to some ships of less than 5,000 tons, and that some reference seems to be intended to the Hague Convention, perhaps, when liberty was given to the larger ships to leave, it may have been intended that they too should have safe conducts if applied for. But no such application was in fact made, and the evidence rather indicates that it would have been refused; and I think on the whole it will be safer to assume that no safe conduct would have been given to the *Gutenfels* even if she had asked for one.

Under these circumstances, what order should the Court make? We have found that the *Gutenfels* is an enemy ship which entered an Egyptian port after the outbreak of war—and for the moment I will assume that she did so in ignorance of hostilities. It has been proved that for a period of two months she was at perfect liberty to quit the port, though she declined to avail herself of the permission.

I confess that I am doubtful as to what our order should be. And as the main questions to which the attention of the Court was directed at the hearing related to the right of an alien enemy to be heard, and to the right of sanctuary claimed by enemy ships lying within the Canal precincts, and consequently this, which was then a subsidiary though highly important matter, hardly received as much attention as it deserved, we have decided to let it stand over for further argument, either in this or in a similar case.

Under these circumstances we shall only make an order finding that the *Gutenfels* is an enemy ship which has been

properly seized as prize, and that she is to be detained by the Marshal until further order of the Court. The further hearing of the case is adjourned generally, with liberty to all parties to apply.

GRAIN, J.—The first point which has to be considered in this case is the preliminary one as to whether we can hear the alien enemy or not.

This point was recently referred to in the case of *THE CHILE* (*ante*, p. 1; [1914] P. 212), which was before the President of His Majesty's Prize Court, but no further decision was given beyond stating that in that case the affidavits before the Court disclosed no grounds on which the alien enemy had a right to be heard. But in the case of *THE MÖWE* (*ante*, p. 60; [1915] P. 1) the subject was exhaustively discussed before the President of His Majesty's Prize Court, and judgment was given to the effect that whenever an alien enemy conceives that he is entitled to any protection, privilege, or relief under any of the Hague Conventions of 1907, he shall be entitled to appear as a claimant, and to argue his case before the Court. With this decision I am absolutely in agreement, because it appears to me to follow the practice which had formerly been initiated in His Majesty's Prize Court. In *THE FENIX*, otherwise *PHOENIX* [1854] (Spinks, 1; 2 Eng. P.C., pp. 240 and 241), it is laid down that "In the last war the principle and practice was that in the case of enemy claimants it was necessary to state something to shew that they had a *locus standi*. The same course must be followed in the present war (1854)"; and in this particular case, although the affidavits before the Court did not shew such ground of claim, nevertheless the President continued: "but in the present case, instead of having a further affidavit, let us assume it has been made, and proceed to the argument." And the counsel for the alien enemy (Russian) was allowed to appear and argue the case. Also in *THE PANAJA DRAPANIOTISA* [1854] (Spinks, 336; 2 Eng. P.C. 562-564) it was laid down that, to support a claim in the Prize Court, an individual who is an alien enemy must shew that he is entitled to *locus standi* either under Order in Council, or licence, or something outside the mere fact of being an enemy, before he can be heard.

These cases lead me to come to the conclusion that it has always been the rule that, so long as the enemy can shew some



ground for appearance outside his enemy character, he has been allowed to appear before the Prize Court. And therefore there appears to be abundant authority for coming to the conclusion that, with regard to this Court, whenever an alien enemy shews by his affidavits that he considers that he is entitled to any protection, privilege, or relief under any of the Hague Conventions of 1907, or any Conventions relating to the neutrality of the Suez Canal, or claims any relief arising out of the special relations in which Egypt stands towards His Majesty's Government, he shall be entitled to appear as a claimant, and to argue his claim.

[After dealing with the duty of the Prize Court to consider the circumstances which led up to capture, the judgment continued:] We are therefore compelled to take into consideration, as applying to the history of the proceedings with regard to this ship, before its actual capture by H.M.S. *Warrior*—first, the *status* of Egypt; secondly, the Conventions of the Suez Canal; thirdly, proclamation, decrees, &c. of the Egyptian Government; fourthly, incidentally, the Hague Convention of 1907.

First, then, let us consider what was the *status* of Egypt. Was this ship in a neutral port or not when the proceedings preliminary to her capture took place? The exact *status* of Egypt has for many years been to a certain extent a conundrum, and very difficult to determine. Egypt, up to December 18, 1914, was part of the Ottoman Dominions, and under the suzerainty of the Sultan of Turkey. Now Turkey, from the beginning of the war up to the time of the final capture of this ship, had certainly not shewed herself to be a neutral. She had commenced by harbouring German ships of war and their officers and crews; she was retaining German officers in her army, and increasing their numbers; she was placing German naval officers on her own battleships. Can this be considered the conduct of a neutral Power? It certainly appeared to be a neutrality, if such it can be called, of a nature very friendly to Germany, one of the belligerents in the war—a neutrality which culminated in a declaration of war against Great Britain and preparations for hostile acts, in which Germany joined, for the purpose of destroying that Canal with regard to which it is now being urged on behalf of the owners of German ships that it is a harbourage which ought to be considered free from all attacks and hostile acts.

[Judge Grain dealt with the history of the Canal and the Convention of 1888, and continued as follows:] One of the questions now to be determined is, How is the matter which is now before us affected by this Convention, and in what way is the Convention to be interpreted in applying it to the circumstances of the present day and this case? This is a somewhat difficult point, because at the time when this Convention was drawn up, twenty-six years ago, there were many possibilities which could not have been considered, as they have developed since that date, and therefore could not have been in contemplation when this Convention was signed. Therefore the Convention has to be interpreted with a view to the altered circumstances which have arisen. I have come to the conclusion that the right interpretation is that, generally speaking, at all times, whether nations are at war or peace, there is a right of free passage (that is, entrance, passage through, and exit—nothing more) for ships of all nations through the Canal; but under certain circumstances, such as danger to the free navigation of the Canal, I consider that this privilege might be curtailed.

By the Convention of January 30, 1866, article 1, the Egyptian Government reserve to themselves the right to occupy positions in the Canal lands necessary for the defence of the country, provided that no obstacle is caused to the navigation of the Canal. The proper interpretation, in my opinion, of this Convention is that it is the right and duty of the Egyptian Government both to protect their country by way of the Canal, and at the same time protect the open navigation of the Canal.

The s.s. *Gutenfels*, according to the evidence before us, entered Port Said harbour on August 5, and beyond the statement that her agents told her master that she could not proceed, there is no evidence that she ever attempted or suggested continuing her course through the Canal, but remained at anchor in the harbour. Certainly the port officer states that she was detained until August 14—that is, if she had asked for clearance papers she would not have received them; but on August 14 she was informed that she was free to proceed until August 17, and during that time she made no effort to proceed. On August 17 a general order was issued by the General Officer Commanding the British troops that no enemy ship was to proceed through

the Canal, but she was still free to proceed west, and was so free until October 13.

It is necessary at this point to consider a proclamation called a *Décision* which was published by the Regent and the Egyptian Council of Ministers on August 6. This proclamation contains the following directions regarding the conduct of vessels in the Canal:

By article 14, all German ships which quitted their last port and entered an Egyptian port without knowledge of war had permission to leave up to sunset of August 14; and by article 20, all merchant ships which had, or were about to pass through the Canal, had permission to leave without being captured or detained, so long as they did so in the normal way, and without unjustified delay.

I will deal with the effect of this proclamation as regards the movements of this ship. From August 14 to August 17 she was free to proceed east or west, so long as she did so in the normal way, and without unjustified delay. What did she do? She did nothing, but remained as before at anchor, and, as the affidavit of her own master states, without molestation (beyond the removal of her wireless installation on August 5) until October 13.

Was this ship adhering to the proper meaning of the Suez Canal Convention? Is she entitled to come before the Court now and plead that Convention? I am of opinion that she has not that right; that she had parted with all her rights under that Convention by ceasing to obey the spirit of it, which was emphasised in the *Décision* of the Egyptian Government—namely, she was free to leave through the canal if she did so in a normal way, and without unjustified delay. She was merely using it as a harbour of refuge and no longer using it as a commercial route to her destination. She had in reality taken refuge in an Egyptian port; and it now becomes necessary to continue to consider whether or no that Egyptian port was a neutral one.

If Port Said is to be considered a Turkish port, it is to be assumed that ships taking shelter there would receive the same treatment which they did at Constantinople—that is, treatment of the most friendly nature. But from the evidence before us it is clear that they received no such friendly treatment; for instance, they had their wireless installations removed, and later on were handed over to one of His Majesty's ships. Therefore it appears

to me that it would be ridiculous on the facts placed before us to consider Port Said a Turkish port.

If it is not a Turkish port, then comes the question, What is the *status* of this port? What did the Government of Egypt themselves consider to be their *status*?

The *Décision* of S.E. the Regent and his Ministers (the Khedive, the reigning sovereign of Egypt under the suzerainty of the Sultan of Turkey, was absent at Constantinople at this time, and was subsequently deposed), which I have already referred to as being published on August 6, 1914, is of considerable assistance in coming to a conclusion on this matter. The preamble of this *Décision* is as follows:

“Considering that war is declared between His Majesty the King of Great Britain and the Emperor of Germany, and

“Considering that the presence in Egypt of the Army of Occupation of His Britannic Majesty renders the country liable to attack by the enemies of His Majesty, they consider that all necessary measures should be taken to defend the country against such attack.”

It then goes on to lay down certain rules and regulations to be observed in consequence of the war and liability to attack from Germany:—that persons resident or passing through Egypt during the continuance of the state of war were not to make contracts with or send money to the Government at war with Great Britain, &c. &c.; and article 13 states that “the British Naval and Military Forces shall exercise all rights of war in the ports and territory of Egypt, and warships, merchant ships, and merchandise captured in the ports or territory of Egypt shall be handed over for judgment before the British Prize Courts.”

In this *Décision* they admit that their country is liable to attack by Germany, the enemy of Great Britain, and take, not the part of Germany, as was the case of Turkey, but side with, and put themselves, so to speak, under the safe custody of Great Britain. Surely this is fairly conclusive evidence that Egyptian ports were no longer neutral ports, but if not to all intents and purposes British ports, at least their allies' or co-belligerents of Great Britain. It appears to me that this *Décision* of the Regent and Ministers of the Government of Egypt makes abundantly clear the view that the Egyptian Government took of their *status*.

Next to be considered is the view that Great Britain took of the *status* of Egypt.

By the Hague Convention No. XIII. of 1907, in article 4, it is laid down that "A Prize Court cannot be established by a belligerent on neutral territory . . ." But in Egypt a Prize Court has been established by Great Britain, and by the Order in Council dated August 5 it is ordered that "ships captured by the fleets and ships of Great Britain shall be brought before such Courts within our dominions, possessions, or colonies as shall be duly commissioned to take cognizance thereof," and this Court is one of such Courts as has been commissioned so to do.

Incidentally I may say that for the purposes of my argument in this case it is not necessary to find that Egypt is either a British dominion, possession, or colony, because, as stated by Pitt Cobbett in his book on *International Law*, vol. ii. p. 192, "in principle it would seem that a Prize Court may rightly be established in the territory of an ally or co-belligerent."

It might perhaps be urged that the treaties with Turkey regarding capitulations (which by the way Turkey has abolished without the consent of the other contracting parties) would give the right to Great Britain to establish a Prize Court in Egypt; but for various reasons I am of opinion that they would not, and only mention it in order that it may not be suggested that this point has not been considered by me. In *THE FOX* [1811] (Edwards, 311; 2 Eng. P.C. 61) it was laid down by Sir William Scott, afterwards Lord Stowell, that "the prize court will presume that the orders of the sovereign are in accord with the laws of nations," and that "the proper evidence for the Court to receive is the declaration of the state itself." We have now the evidence of both States before us; that of the Regent and Ministers of Egypt, who declare that all ships captured in Egyptian ports shall be handed over for judgment in the British Prize Court; and we have the Act of Parliament instituting the Prize Court in Egypt, which they had no power to do, unless Egypt was either an ally or co-belligerent or possession. I cannot, therefore, on the evidence which is at present before me, avoid finding that Port Said at the period in question was not a neutral port. I do not know that it is necessary to go further than that, but if necessary I am prepared to find that it was a port of an ally.

I do not propose at the present time to refer to the Hague Convention No. VI. of 1907, articles 1 and 3, because on the evidence at present before me I am of opinion that the s.s. *Gutenfels* entered Port Said with knowledge of the war; but

as an undertaking has been given to counsel who appears on behalf of the alien enemy not finally to decide this point until hearing him further, I am prepared to consider any fresh evidence or facts he is able to place before the Court.

Therefore, for the reasons which I have set out in this judgment, I concur with the judgment of my brother Judge, and the order which he has made in this case.<sup>1</sup>

(1) The Editor is indebted to Mr. Norman Bentwich, of Lincoln's Inn, Barrister-at-Law, for the reports of the judgments in this and the following Egyptian cases.

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[IN H.B.M. PRIZE COURT FOR EGYPT.]

(*Sitting at Alexandria.*)

CATOR, P., and GRAIN, J. Jan. 21, 1915.

### THE BARENFELS.

*Enemy Ship—Seizure in Belligerent Port—Safe Conduct—Days of Grace—Use of Suez Canal Port as Port of Refuge—Hague Conference, 1907, Convention No. VI. art. 2—Form of Order—Retaliation—Right of Crown to Prizes Taken in Egyptian Ports.*

*A British Prize Court is bound by Convention VI. of the Hague Conference, 1907. Accordingly, an enemy vessel using a port of the Suez Canal as a port of refuge, and which, although free to have left the port, has not been offered a safe conduct to a neutral port, can only be detained during the period of the war, and not confiscated:—Held (GRAIN, J., dissenting), that the vessel must be restored to her owners at the end of the war or her value paid to them.*

*The British Crown is entitled to the benefit of the prizes seized in Egyptian ports, the Egyptian Government making no claim thereto.*

Action for the condemnation of the German steamship *Barenfels*, a vessel of over 5,000 tons register, belonging to the Hansa Line, which arrived at Port Said on August 1, 1914, four days before the outbreak of war between Great Britain and Germany, and continued to remain, using the port as a port of refuge. She was at liberty to leave at any time from August 14

to October 13, although no safe conduct was offered to her. She was then boarded by Egyptian officials, and on October 16 taken out to sea, handed over to H.M.S. *Warrior*, and brought into Alexandria for adjudication.

*Arthur Preston (H.M. Procurator-General)* asked for an order for condemnation, or an order for detention with liberty to apply, as in *THE CHILE* (*ante*, p. 1; [1914] P. 212).

*G. A. W. Booth*, for the owners, submitted that the Court was bound by the Hague Conventions, and in accordance with Convention VI. articles 1 and 2, the *Barenfels* should be restored to her owners at the end of the war.

CATOR, P.—Except for the fact that the *Barenfels* was already in Port Said when war was declared—a circumstance which for the purpose of this judgment is immaterial—her case is not distinguishable from that of *THE GUTENFELS* (*ante*, p. 102), which was determined by us on January 6 last. She is an enemy ship properly seized in Port Said, and under the old law liable to an order of confiscation for the benefit of the Crown. Such an order is what the Procurator asks us to make now. Failing that, he begs us to make only a general detention order without prejudice to further applications. Mr. Booth, on the other hand, asks us to order detention of the ship during the war and delivery to the owners at its conclusion, and bases his claim to this order upon the terms of Convention VI. of the Hague Conference of 1907. It has been assumed, as I think rather lightly, that because the Hague Conventions are binding on the Crown effect must of necessity be given to them in this Court; but that by no means follows.

To adopt the words of a celebrated American Judge, speaking of nations other than the United States, a treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is intraterritorial, but is carried into execution by the sovereign power of the respective parties to the instrument—*Marshall, C.J., in FOSTER & ELAM v. NEILSON* [1829] (*Scott's Cases on International Law*, 412). And it may be taken as a general rule that a British Court should not attempt to enforce a treaty without some authority emanating on that behalf from the Crown. Consequently I must consider

how, if at all, the Hague Conventions have been made binding upon our Prize Courts. There is no explicit legislation on the subject, but I have come to the conclusion that the difficulty has been surmounted indirectly, inasmuch as the Order in Council establishing the Courts, and the commissions to Judges issued thereunder, require the Judges to determine causes "according to the course of Admiralty and the Law of Nations," and it can hardly be disputed that the Hague Conventions, to which the United Kingdom is a party, must, so far as we are concerned, be deemed to be a part of the law of nations for the time being. Moreover, Order XXVIII. of the Prize Court Rules, 1914, which are issued by Order in Council under the authority of the Prize Courts Act, 1894, distinctly recognises the possibility that the Court may be called upon to make an order for detention of a ship in pursuance of some international convention. I am consequently prepared to hold that the Court is bound by the Hague Convention VI.

Article 1 of this Convention expresses the desirability of permitting an enemy ship a reasonable period in which to proceed under a safe conduct to its port of destination, or such other port as shall be named for it, presumably one of its own ports or a neutral port, though the Convention does not say so. Article 2 says, "A merchant ship which owing to circumstances beyond its control may have been unable to leave the enemy port during the period contemplated in the preceding Article, or which was not allowed to leave, may not be confiscated. The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation."

The language of article 2 is plain and peremptory. It has been suggested that it depends upon article 1, and is to be governed by the words "It is desirable" in that article, but I cannot accept that view. The two questions are quite independent and rest upon different considerations. The Powers could not agree that under all circumstances they would let merchant shipping leave the country, but they did agree that enemy ships detained in port on the outbreak of war should not be confiscated.

The preamble declares that the Powers have concluded this Convention, being "Anxious to ensure the security of international commerce against the surprises of war, and wishing, in



accordance with modern practice, to protect as far as possible operations undertaken in good faith and in process of being carried out before the outbreak of hostilities."

Our duty is to give effect to the intention of the parties, and the language of this preamble makes it clear that the clauses of the Convention are to be construed liberally in favour of any ship which may have had the misfortune of finding itself in an enemy port at the outbreak of war.

An Order in Council was published on August 4, 1914, declaring that, with certain exceptions, the British Government was prepared to give days of grace and safe conducts to German ships found in British ports if satisfied that Germany would act in a similar manner by British vessels; but as no satisfactory assurance was received from Germany the days of grace were not conceded.

Whether the rights of enemy ships under article 2 of the Convention were determined or affected by that Order I will not stop to enquire, inasmuch as it did not apply to Egypt, and the only declaration of policy which we can look at is the proclamation of the Egyptian Government published in the *Journal Officiel* on August 6.

This proclamation differs materially from the Order in Council, but was admittedly issued with the consent or by the direction of the British authorities, and may be taken to be the expression of their intentions in regard to Egypt. It grants liberty to all German ships found in the Egyptian ports at the outbreak of war except, amongst others, ships over 5,000 tons register, to leave freely up to sunset on August 14, but no offer is made of safe conduct. And although no safe conduct is promised, the liberty to go is not qualified or made dependent upon any action that might be taken by the enemy in regard to British or Egyptian vessels.

The *Barenfels*, being over 5,000 tons, was not entitled to any benefit under the proclamation; but it is in evidence that she was in fact at liberty to leave Port Said at any time from August 14 until October 13, 1914, and I am of opinion that the master was fully aware that she could do so. At the same time it is to be borne in mind that no safe conduct was offered to her, and I am of opinion on the evidence that, if asked for, it would have been refused.

What might be the position of a ship which declined to avail herself of a safe conduct need not be considered. We have only to determine whether a ship lying in port is to be deprived of the protection afforded by the Convention, because, though a safe conduct is denied to her, she is at liberty to quit the port. I am emphatically of opinion that she is not to be prejudiced by reason of her remaining. Permission to leave, unless accompanied by a safe conduct, is wholly illusory. It in no way satisfies the intention of article 1 of the Convention; and if the *Barenfels* had steamed out of Port Said it may be postulated as a certainty that she would have been captured on reaching the high seas. I have no doubt that article 2 applies and the ship cannot be confiscated.

In this connection, however, we have to consider another point. The Procurator asks us to make an open order for detention, a mere direction to the Marshal to detain the ship until further order of the Court, without any declaration as to the rights of the parties. The owners claim that they are entitled to a decree for restoration of the ship at the end of the war.

It is suggested by the Procurator, as it was suggested in *THE CHILE* (*ante*, p. 1; [1914] P. 212), that perhaps Germany will not adhere to the terms of the Convention, and in that event Great Britain may decline to be bound by it. Be it so. It is quite true that the rules of International Law are not immutable. In the last resort they depend on reciprocity. This is peculiarly the case in regard to prize law, and if the Crown could produce evidence that Germany had flagrantly broken her bargain respecting the treatment of British ships, I conceive that we should be justified in moulding our practice according to her example. But the mere suspicion that she will break her word ought not to affect our judgment now. Having once come to the conclusion that the Convention applies, I am of opinion that we must give the ship the fullest benefit to which she is entitled under it. The Crown has no right to ask for a suspension of our decision in order to see how Germany will act. Suspicion begets suspicion; and if one party does not loyally perform its duties under an agreement there is great danger that the pact may be broken by the other side, and a war of reprisals once begun there is no setting a bourne to their extent. In this war we claim and believe that we are fighting to uphold the sanctity of treaties, and it lies with us to maintain this great principle, even though its

maintenance should demand a much heavier sacrifice than the value of any ships which may have been detained in our ports.

On this point my brother and I have a certain difference of opinion. He thinks that the Crown should be allowed further time in which to ascertain what attitude has been adopted by Germany. Consequently, although he agrees that the ship is to be detained, I must take upon myself the responsibility for the remainder of the order.

There will be a declaration that Convention VI. art. 2 applies, and an order that the ship is to be detained during the war, with a declaration that she must be restored, or her value paid, to the owners at the conclusion of hostilities.

There remains one other small matter to be mentioned. At the hearing of *THE GUTENFELS* (*ante*, p. 102) I raised a question as to the rights of the Egyptian Government in regard to prizes seized by its officers in Egyptian ports. The Procurator now informs us that he is instructed by the Egyptian Government to say that it makes no claim, that its officials merely acted as agents for the British authorities, and that any rights that it may be entitled to it relinquishes to the Crown.

GRAIN, J.—The s.s. *Barenfels* is a ship belonging to the German Hansa Line, of over 5,000 tons, and was in Port Said four days before the war broke out. It is admitted by counsel on behalf of the owners that she took refuge in that port, and it is found that she is an enemy ship properly seized at Port Said and handed over to H.M.S. *Warrior* on October 16 and ultimately brought to Alexandria on October 17.

The Crown asks us for an order for confiscation, or at least an order for detention with liberty to apply as in *THE CHILE* (*ante*, p. 1; [1914] P. 212). On behalf of the owners an order for detention and restoration at the end of the war without payment of compensation is asked for. This order is asked for by the owners on the ground that articles 1 and 2 of the Hague Convention No. VI., of 1907, apply. It is argued on behalf of the Crown that the Hague Convention of 1907 does not apply, as that Convention is merely an announcement of principles on which it is desirable to act, and that the Convention has no binding power over the Court until it is applied by the laws of this country. On behalf of the owners of the vessel it is argued that article 2 of the Hague Convention is a peremptory order, and

that if it is necessary that the Convention should be applied by the law of this land it has been applied by the decree of the Ministers of the Egyptian Government styled the "*Décision*" of August 5, 1914.

The first point to decide is, Can this Court take into consideration the Hague Convention unless it has been applied by the law of the State? The Hague Convention was a treaty entered into by several of the Powers, amongst others Great Britain, Germany, and Austria. Wheaton, in his work on International Law, states, "A treaty must be considered imperfect in its obligations until the national assent has been given in the forms required by the municipal constitution," and "the implied condition in negotiating with foreign Powers is that the treaties concluded by the executive Government shall be subject to ratification in the manner prescribed by the fundamental law of the state" (see *Wheaton's International Law*, 4th ed., pp. 374, 375). In *WALKER v. BAIRD AND ANOTHER* [1892] (61 L. J. P.C. 92; [1892] A.C. 491) it was laid down by Lord Herschell, sitting in the Judicial Committee of the Privy Council, "that an act done by the authority of the Crown for the purpose of carrying out a treaty entered into between the Crown and a foreign Power would not have the assent of a court of law unless such treaty had received legislative sanction." Also Marshall, C.J., in the American case of *FOSTER & ELAM v. NEILSON* [1829] (*Scott's Cases on International Law*, p. 412), states that "a treaty is a contract between two nations, not a legislative act, and does not generally affect the object to be accomplished unless it is carried into execution by the sovereign powers of the respective parties to the instrument."

The question is, Are we sitting here in Prize Court bound by these very weighty decisions? If we are, it appears to me that we should be compelled to find that the Hague Convention does not apply. Pitt Cobbett, in his *Cases on International Law*, vol. ii. (3rd ed.), p. 192, commenting on Prize Courts, states that such Courts are "only national Courts, for the reason that they are established and regulated by the sovereign authority of the country in which they sit, and must ultimately take their law from it, even though that law may not conform to the law of nations." "Although they will perhaps even more than other Courts seek to put such a construction on municipal rules as will bring them into conformity with the admitted usage of nations."

But I am of opinion that we are entitled to go further than that. By the Order in Council and the Commission appointing us to sit in prize in this Court, we are commissioned to hear and determine according to the Law of Nations. If we had been sitting solely for the purpose of administering the municipal law of this land I should have had grave doubts as to the application of the Hague Convention; but as we are sitting to administer the Law of Nations, or International Law, the question becomes a comparatively simple one.

British law may be said to have always recognised International Law as a certain collection of certain rules which have become binding on States, either by immemorial usage or by virtue of agreement. And when once a rule of law is shewn to have received the assent of civilised States it will be deemed to have received also the assent of the British Courts, and will be applied by Courts sitting in any capacity which necessitates the straying from the ordinary paths of municipal laws to the fields of the Law of Nations.

There is no doubt that the Hague Convention has received such assent from the chief civilised States of Europe, and that it is an International Law promulgated by virtue of agreement of such States; therefore I have no hesitation in coming to the conclusion that we are bound in this case to take into consideration the first paragraph of article 2 of the Hague Convention No. VI. of 1907, and that consequently she "may not be confiscated."

So far, and I am glad to say on the important points in our judgment, I am in agreement with the Honourable President of this Court; but I regret to say that on a minor point—namely, in the form that the order of this Court should take, I do to a certain extent differ from his view. But, as the senior member of this Court, the President's order will prevail and will be the order of the Court in this matter.

As I do differ from the form of order made, it is as well, perhaps, for me to give my reasons. The form which I consider our order should take in this matter is an order for detention with liberty to apply—in fact, the order in *THE CHILE* (*ante*, p. 1; [1914] P. 212)—and for the following reasons:

Although we are sitting in this Court for the purpose of listening to evidence concerning certain facts and law, and to arguments on such facts and law, I cannot think that we are

bound to shut our minds to certain reports and charges with regard to the breaking of treaties and conventions that are cognisant to the whole world. And it would be idle to pretend that at the present moment there are not grave charges being made against the German nation of having broken article after article of the Hague Conventions. These reports and charges may have no foundation, but, nevertheless, at the present moment they have never been adjudicated upon, and one can express no opinion on their truth or otherwise. It may be said that because one party to a contract breaks that contract it does not free the other party. That may be so in the ordinary case of law or affairs of life, but in the laws of nations connected with warfare the rule of reprisals has always been recognised.

I have therefore come to the conclusion that the order we should make in this case is one for detention only, with liberty to apply, and to reserve for some future occasion, when many questions which are now in so much doubt shall have been settled, for a final order in this case.<sup>1</sup>

(1) See note, *ante*, p. 122.

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[IN H.B.M. PRIZE COURT FOR EGYPT.]

(*Sitting at Alexandria.*)

CATOR, P., and GRAIN, J. Feb. 3, 1915.

### THE MARQUIS BACQUEHEM.

*Enemy Ship—Ignorance of Hostilities—Boarding at Sea—Permission to Continue Voyage—Subsequent Seizure in Belligerent Port—Days of Grace—Duty of Prize Court to Act Equitably—Hague Conference, 1907, Convention VI. arts. 2 and 3.*

*An enemy vessel, after being stopped at sea by a British cruiser and told of the outbreak of hostilities, was permitted to continue her voyage, and thinking that it was a neutral port she went into the Port of Suez, where she was detained and subsequently taken to sea and handed over by the Egyptian authorities to another British warship :—Held, that although the vessel could not claim any right under article 2 of Convention VI. of the Hague*

*Conference, 1907, a British Prize Court should give effect to the object of the Conventions, and should interpret the rules of International Law in a broad spirit; and since the vessel had derived her information from a British cruiser, which had allowed her to proceed, she could not be confiscated, but merely detained and restored to her owners at the end of the war.*

Action for the condemnation of the Austrian-Lloyd steamship *Marquis Bacquehem* as prize.

On August 17, 1914, in the course of her voyage from Karachi to Trieste, the *Marquis Bacquehem*, a vessel of 4,412 tons gross, was stopped in the Red Sea by H.M.S. *Duke of Edinburgh* and informed that a state of war existed between Great Britain and Austria, but was allowed to continue her voyage. She then entered the Port of Suez, apparently in the belief that it was a neutral port. As a precautionary measure for the safety of the Canal, part of her machinery was removed to prevent her proceeding, and on October 27 she was taken out to sea by the Egyptian authorities, handed over to H.M.S. *Mosquito*, and eventually brought to Alexandria.

*Arthur Preston* (H.M. Procurator-General), for the Crown, asked for an order of condemnation.

*C. M. Halford*, for the claimants, the Austrian shipowners, submitted that the vessel should be restored to her owners.

The arguments appear in the judgments.

CATOR, P.—This is a somewhat peculiar case, but except in one particular presents no aspect of special difficulty. The *Marquis Bacquehem*, of the Port of Trieste, is an Austrian-Lloyd steamer of 4,412 tons gross, not provided with wireless telegraphy. According to her log she left Karachi on August 4, 1914, bound for Trieste. We were told that she was originally bound for Venice and Trieste, but at the last moment received orders to go direct to Trieste and drop her passengers at Suez. According to her log the master was ordered to go straight to Suez, without touching at Aden, and there to discharge his Aden cargo. Nothing is said about passengers, and the Marshal informs me that the ship is not constructed for passenger traffic. I may mention here that I have discovered in the ship's log a very suggestive memorandum, which does not figure in

the summary, and seems to have escaped the Procurator's eye. It is written in Italian like the rest of the log, but appears in a loose sheet of paper between the pages of the log for the date August 12-13, and is to the following effect:

"12/13 August, 1914. We navigate at the same speed. At 8.30 Ras Marshay was sighted. As by approaching Aden we might meet the 'natanti'" (a word which may perhaps mean divers) "and in order not to be seen, we navigate without lights, this all the more as we had seen some searchlights from the direction of the harbour."

"13th August. At night we navigate without lights towards the Straits of Perim keeping our steamer out of the way in order to avoid encounters."

Nothing of importance turns upon this memorandum, but it has some significance in view of Mr. Halford's claim that the *Marquis Bacquehem* was prosecuting her voyage in complete ignorance of war and prepared to continue her journey all the way to Trieste. On August 17 the ship was stopped in the Red Sea by H.M.S. *Duke of Edinburgh* and boarded by an officer, who made the following entry in the ship's log:

"Boarded s.s. *Marquis Bacquehem* in lat. 22.25 N. long. 37.8 E. and informed Captain that a state of war exists between England and Austria. Being within the period of grace, allowed ship to proceed on her voyage.

"(sgd.) etc.

"H.M.S. *Duke of Edinburgh*,

"Commanded by, etc."

On what instructions this entry was made we do not know. It seems to have been written under a misapprehension. The ship had left her last British port before the war broke out, so that no question of days of grace could arise. To put her in the most favourable position, she was an enemy ship met on the high seas without knowledge of the war, and consequently under article 3 of the Sixth Hague Convention entitled to be detained instead of confiscated, and the captain of the *Duke of Edinburgh* ought, I think, to have seized the ship and taken her before a Prize Court for condemnation.

On August 20 she reached Suez, and the captain of the port, acting under general orders to prevent enemy ships entering the Canal, removed certain parts of the machinery so as to disable her from proceeding. This, according to the evidence of



Captain Trelawny, was done as a precautionary measure for the protection of the Canal. From this date until October 27 the *Marquis Bacquehem* lay in Suez Roads, when she was taken into the Gulf of Suez by the Egyptian authorities and handed over to H.M.S. *Mosquito*, just as the *Gutenfels* and other ships in Port Said were handed over to the *Warrior*. She was subsequently taken through the Canal and brought to Alexandria.

Although the allegation that the ship had received a safe conduct is not true, we are none the less asked to decree her restoration on the ground that she was not permitted to pass through the Canal. I cannot see that this fact affects the case. I greatly doubt if she ever intended to proceed beyond Suez, but even had that been her intention her position would not be bettered. I doubt if a Prize Court can ever take cognizance of an infraction of the Canal Convention. A complaint on that ground must, I think, be left to diplomatic action. But however that may be, and I do not decide the point, there can be no doubt that the military authorities were entitled to take such precautionary measures for the safety of the Canal as they might think fit. In the exercise of their discretion they put it out of the power of the *Marquis Bacquehem* to proceed, and it is certainly no part of our duty to enquire whether the circumstances warranted this exercise of their discretion or no.

The case is not distinguishable from those of *THE GUTENFELS* (*ante*, p. 102), and *THE BARENFELS* (*ante*, p. 122), except in one curious particular. Article 1 of the Sixth Hague Convention draws a distinction between ships which enter an enemy port with, and those which enter without, knowledge of the outbreak of hostilities. It is plain that the *Marquis Bacquehem* had notice of the war in the course of her voyage. On hearing the news she might have shaped her course for a neutral harbour in the Red Sea, yet she preferred to go on to Suez, and as she entered that port with knowledge of the war, she could not in strictness claim any benefit under article 2.

If the news had reached her through any source but that of a British man-of-war, I apprehend that we should have no option but to condemn her to confiscation. That would have been her fate under the old law, and she can only escape by bringing her case within the exceptions specified in the Hague Convention, and when the language of the Convention is clear we must abide by it. For although I have every wish

to construe its articles in a liberal spirit, the Court cannot modify or add to them.

It is suggested that it would be unjust to make the ship suffer for what appears to be the mistake of a British naval officer; but that is a mis-statement of the position. All that happened is that the *Marquis Bacquehem* gained a chance of escape which she had no right to expect. Days of grace are intended to afford opportunity for an enemy ship to reach her own or a neutral port, and if after notice she prefers to enter the lion's den she has but herself to blame if she be devoured. It is probable that she went to Suez in the belief that it would be treated as a neutral port. This may be presumed from the entries in her log, which I prefer as evidence to the affidavit of the master. We know that she had no immediate intention of passing through the Canal, as she had first to discharge her Aden cargo. I cannot find that she ever made any demand for a passage, and according to the entry in the log on October 26 the master protested vehemently at his ship being expelled from what he calls neutral waters. But we have already decided that the Canal ports, as ports, are not neutral (*vide* THE GUTENFELS, (*ante*, p. 102), and in this respect the *Marquis Bacquehem* has no greater claim to immunity from seizure than any other enemy ship. On that point I have no doubt, but I find it hard to decide whether we should confiscate the ship or only order her detention. For although it is true that after being warned the *Marquis Bacquehem* might have run for a neutral port, it certainly does seem hard that she should be in a worse plight because the *Duke of Edinburgh* allowed her to proceed instead of taking her before a Prize Court, especially as this permission seems to have been given in the belief that the ship was entitled to consideration in consequence of her ignorance that war had broken out. Moreover, no stipulation was made that she should go to a neutral port, and she may have been encouraged in the belief that she could enter Suez in security. On the whole, I think that we should only order detention. A Prize Court is peculiarly the guardian of its nation's honour, and foreign countries will cite its decisions as indicating the temper of its people. An English Prize Court should certainly interpret the rules of International Law in a broad spirit rather than a narrow one. England has accepted the principles of the Hague Conventions, and the whole aim of these Conventions is

to ameliorate the sufferings and losses of individuals. It is our duty to give effect to that intention; and as a ship brought before a Prize Court by the Crown may in some sense be compared to an accused person, I think the *Marquis Bacquehem* should benefit by any doubt that may exist in the mind of the Judge.

There will be an order for detention during the war, and restoration to her owners at its conclusion.

GRAIN, J.—The circumstances of this case, except for the incident which happened on August 17—namely, the meeting with H.M.S. *Duke of Edinburgh*—in no way differ from the other cases of capture in the ports of Egypt which have already been adjudicated upon. It has been urged on behalf of the owners that the entry in the log which was made on August 17 by the naval officer of H.M.S. *Duke of Edinburgh* was a licence of safe conduct, and freed her from capture.

I cannot agree with that suggestion. It appears to me that H.M.S. *Duke of Edinburgh*, under a misapprehension, neglected to capture the *Marquis Bacquehem* when she had the right to do so, and merely allowed her to proceed. This action on her part in no way prevented her capture by any other ship or authority who were not labouring under this misapprehension.

The point which remains is, Are we in consequence of this incident to consider that this vessel has lost the relief granted under the Hague Convention? That is to say, does she become a vessel entering port with knowledge of war on account of the knowledge which she has received from H.M.S. *Duke of Edinburgh*? I am of opinion it would not be just to take advantage of this incident to make out a case of confiscation against her.

Therefore I agree with, and am prepared to concur with, the judgment of the President in this case. I should have preferred an order for detention with liberty to apply, but do not press it to the extent that I did in *THE BARENFELS* (*ante*, p. 122), as I consider the circumstances in the matter now before me are somewhat different from the facts in that case.<sup>1</sup>

(1) See note, *ante*, p. 122.

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). Sept. 4, 1914.

## THE PERKEO.

*Enemy Ship—Capture at Sea—Ignorance of Outbreak of War—Hague Conference, 1907, Convention VI. art. 3.*

*Apart from international convention, enemy merchant ships captured on the high seas in ignorance of the outbreak of hostilities are liable to condemnation. Article 3 of Convention VI. of the Hague Conference, 1907, which provides for the detention, instead of confiscation, of enemy vessels which left their last port of departure before the commencement of war and are encountered on the high seas while still ignorant of the outbreak of war, has no application to German vessels, the German Empire, when signing the Convention, having refused its assent to this article.*

Claim for condemnation of ship as prize.

On August 5, 1914, the day after a state of war existed between Great Britain and Germany, the *Perkeo*, a steel four-masted barque of 3,785 tons, flying the German flag, was captured off Dover by H.M.S. *Zulu*, and brought into port as prize. The *Perkeo* had sailed from New York for Hamburg in ballast on July 14, and it was admitted that her master was in ignorance of the outbreak of hostilities. The certificate given by the German Consul at New York stated that the *Perkeo* was a German ship, and her papers shewed that she was formerly the British barque *Brilliant*, which had been transferred to the German flag shortly before the outbreak of war.

*The Attorney-General (Sir John Simon, K.C.), Aspinall, K.C., and Ricketts, for the Procurator-General.—The Perkeo, being an enemy vessel captured at sea, by International Law is liable to condemnation. The only exception to the rule is that contained in article 3, Convention VI. of the Hague Conference, 1907, which provides that "enemy merchant ships which left their last port of departure before the commencement of the war, and are encountered on the high seas while still ignorant of the outbreak of hostilities, may not be confiscated. They are merely liable to be*

detained on condition that they are restored after the war without payment of compensation . . ." Germany signed this Convention, but reserved article 3; therefore paragraph 10 of the Order in Council of August 4, 1914, as to reciprocal treatment for enemy vessels has no application to German vessels captured at sea, and the ship is lawful prize.

An appearance had been entered on behalf of the owners of the *Perkeo* and an affidavit filed, but it was quite insufficient to shew any ground which would entitle them to be heard.

SIR SAMUEL EVANS (THE PRESIDENT).—From the evidence it is quite clear that the *Perkeo* was a German ship transferred from the British to the German flag on July 14, 1914. She was also under the command of a German citizen when captured. She is the type of ship referred to in article 3 of Convention VI. of the Hague Conference, 1907; but the exception therein provided does not arise at all, because the German Empire refused to be bound by article 3. The right of capture therefore exists in this case, and there will be an order for the condemnation of the ship and for her appraisalment and sale.

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*Solicitor—Treasury Solicitor.*

*[Reported by E. C. Trehern, Esq., Barrister-at-Law.]*

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[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). NOV. 2, 23, 1914.

### THE MIRAMICHI.

*Cargo—Contract of Sale C.i.f.—Shipment during Peace—War Supervening on Voyage—Seizure as Prize—Refusal of Documents—Test for Condemnation—Passing of Property or Loss by Seizure—Cargo in British Vessel not Excused.*

*When goods are contracted to be sold, and are shipped without any anticipation of imminent war, and are taken as prize after war has supervened, the cardinal principle is that they are not subject to condemnation unless under the contract the*

*property in the goods has at the time of seizure passed to the enemy.*

*Enemy cargo, shipped without any anticipation of imminent war, and taken as prize in port or at sea after war has supervened, does not escape condemnation because it is in a British vessel.*

*Before any anticipation of imminent war sellers made a c.i.f. contract of sale of wheat to buyers, and in fulfilment of the contract sub-contracted with a merchant to buy wheat shipped by him, and received from him the bill of lading for it, which was indorsed generally. War supervened during the voyage. The sellers were neutrals, and the port of destination was neutral, but the buyers to whom the goods were to be delivered at the port of destination were enemies in the enemy country. The sellers' bankers, who were neutrals, had discounted the bill of exchange drawn by the sellers on the buyers, and had forwarded it and the bill of exchange and the certificates of insurance to a bank in the enemy country for tender of the latter documents against acceptance of the bill of exchange. The vessel was British, and was diverted to a British port, where the wheat was seized by the Crown as prize. Shortly after the seizure the enemy buyers in the enemy country refused to take up the documents. The sellers claimed the wheat as their property. It was contended for the Crown that the test for condemnation was whether the enemy or the neutral would suffer the loss if the wheat was condemned, and that, as the sellers had a right of payment against the buyers and had only a jus disponendi as holders of a bill of lading not indorsed to them, they could not recover the wheat:—Held, disallowing the contention of the Crown, that as the goods were shipped without any anticipation of imminent war the test for condemnation was as to whether the property in the wheat had at the time of seizure passed to the enemy, and that as it had not at that time passed to the buyers, and would not so pass until they took up the documents, the wheat remained the property of the sellers, and must be restored to them.*

Cause for condemnation of cargo as prize.

The claimants were Muir & Co., merchants, of New York, U.S.A., and the Guaranty Trust Co. of New York, bankers,

claiming as neutrals in respect of 16,000 bushels of wheat carried on board the British steamship *Miramichi* and seized as prize in port, as was agreed during the trial, at Eastham, in the Manchester Ship Canal.

The facts, as stated in the judgment, were as follows :

"The subject-matter of the claim in this case is a part cargo of 16,000 bushels of wheat carried on the steamship *Miramichi*, which was seized or captured as enemy property on September 1, 1914, in the circumstances hereinafter mentioned.

"The steamship *Miramichi* was a British ship. The cargo of wheat to which the claim relates was shipped at Galveston, Texas, and was stowed, with other wheat, in holds 1, 4, and 6 of the vessel. It was shipped in July, 1914, before the commencement of the war, and without any anticipation of war. It was destined for the port of Rotterdam, and was intended to be delivered, as to part to George Fries & Co., of Colmar" (in Germany), "as purchasers of 8,000 bushels, and as to the other part to Gebrüder Zimmern & Co., of Mannheim, as purchasers of 8,000 bushels. Both these firms were German firms, and at the time of seizure or capture of the cargo were enemy subjects.

"The two transactions were separate, but there is no distinction in substance, or from the legal aspect, between the two. It will therefore be sufficient to deal in this judgment with one of the cases; and I will take the first—namely, the case of the sale by Muir & Co. to Fries & Co.

"The cargo of wheat destined for Fries & Co. was, as I have said, laden on board the British steamship *Miramichi*. On her voyage towards Rotterdam her owners by telegraph directed the vessel to proceed to Queenstown for orders by reason of the outbreak of war. At Queenstown the owners communicated with the British Admiralty, and asked their instructions as to whether the steamship could proceed to Rotterdam, as the cargo was destined for German merchants. Permission to proceed to Rotterdam was refused, and accordingly the vessel proceeded to the port of Eastham, in the Manchester Ship Canal, as the best port for the disposal of the cargo.

"A question might have arisen as to whether the cargo was captured at sea, or seized in port. But that makes no material difference in this case; and it is agreed that the cargo was seized in the port of Eastham.

"The seizure was on September 1, 1914. The Crown claims the cargo as prize or as droits of Admiralty. The claimants, on the other hand, contend that the cargo was not subject to seizure, as it did not belong to enemy subjects, but to themselves as neutrals, being citizens of the United States of America."

Nov. 2, 1914.—*The Attorney-General (Sir John Simon, K.C.) and R. A. Wright*, for the Procurator-General.—Each of the German firms which bought 8,000 bushels is the owner of that parcel. The test question as to the condemnation of cargo as enemy property is: "On whom was the risk at the moment of capture?"—*THE PACKET DE BILBOA* [1799] (2 C. Rob. 133, 135, 136; 1 Eng. P.C. 209, 211). This was a c.i.f. contract. The sellers, the claimants, had a *jus disponendi*, and to that extent had a special property in the cargo; but they had not the general property, and it was not being carried at their risk. The sellers had a right to payment on tender of the documents, and could sue the buyers in respect of it, because the duty of the sellers was only to insure the goods for the buyers, and when shipped they were at the risk of the buyers—cp. *BIDDELL BROTHERS v. E. CLEMENS HORST CO.* [1911] (80 L. J. K.B. 584; 81 L. J. K.B. 42; [1911] 1 K.B. 214, 934) and *MIRABITA v. IMPERIAL OTTOMAN BANK* [1878] (47 L. J. Ex. 418; 3 Ex. D. 164). Goods shipped by a neutral and consigned to a hostile port to become the property of an enemy on arrival are subject to condemnation if captured *in transitu*—*THE SALLY* [1795] (3 C. Rob. 300n.; 1 Eng. P.C. 28). Otherwise, with bills of lading to order, enemy consignees could refuse to take up the documents, even if they had paid for the goods, and could send the documents back to neutral shippers for them to claim release of the goods as neutral property—see also *THE ATLAS* [1801] (3 C. Rob. 300).

*Leslie Scott, K.C.*, and *R. H. Balloch*, for the claimants.—The right test as to whether goods are to be condemned is, In whom did the property vest at the time of capture? If a neutral shipper owns them they go free, but if the property in them has passed to an enemy consignee they are confiscable—*THE COUSINE MARIANNE* [1810] (Edw. 426; 2 Eng. P.C. 85); cp. *THE IDA* [1854] (Spinks, 26; 2 Eng. P.C. 268). The question is as to the beneficial ownership of the goods. The Prize Court enquires in whom is the property vested, and not merely as to what is called a legal title at common law—*THE ABO* [1854]



(Spinks, 42, 46; 2 Eng. P.C. 286, 288). In the Prize Court the property is always considered to remain until delivery in the same character in which it was shipped—*THE VROW MARGARETHA* [1799] (1 C. Rob. 336, 338; 1 Eng. P.C. 149, 150). The determination in the Prize Court as to the ownership of goods shipped before war is imminent, proceeds on common law principles, and is different from the determination of the ownership of shipments made when war is imminent or existing: Here the common law rules apply. If the goods are at the disposal of the seller, no property in them passes to the buyer—cp. *RYAN v. RIDLEY & Co.* [1902] (8 Com. Cas. 105) and Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 19, rule 5 (2); see also *SHEPHERD v. HARRISON* [1871] (40 L. J. Q.B. 148, 154; L. R. 5 H.L. 116, 128) and *OGG v. SHUTER* [1875] (45 L. J. C.P. 44; 1 C.P. D. 47). The sellers here have the property in the goods and the possession, and have not been paid for them. If these goods were condemned, the enemy would lose nothing, but the whole loss would fall on innocent neutrals. Even if these goods were otherwise subject to condemnation as enemy goods, it has not been the practice to condemn enemy goods seized when shipped before war in a British vessel. In *THE CONQUEROR* [1800] (2 C. Rob. 303) goods in such circumstances were only condemned because of elaborate deception. The Declaration of Paris, 1856, did not deal with this matter, because it was so clear that it seemed unnecessary. It is inconceivable that in the case of goods in an Austrian vessel days of grace should be allowed for them to depart to an enemy destination, but that goods in a British vessel under the protection of the British flag should be condemned.

[*The Attorney-General* (*Sir John Simon, K.C.*).—It is not at all clear that Convention VI. of the Hague Peace Conference, 1907, contemplates the departure of the cargo in an enemy ship when that ship is permitted to sail within days of grace. From article 4 of Convention VI. it would seem that detention of the cargo is intended.]

*R. A. Wright*, in reply, cited *LE CAUX v. EDEN* [1781] (2 Dougl. 612), *LINDO v. RODNEY* [1782] (2 Dougl. 612n.), *THE CARLOS F. ROSES* [1900] (177 U.S. 655), and referred to *Pratt's Story*, p. 28.

Nov. 23.—*SIR SAMUEL EVANS* (THE PRESIDENT).—The learned Judge stated the facts as above set out, and proceeded: The

contest between the Crown and the claimants may be shortly stated as follows: The contention of the Attorney-General for the Crown was that the cargo at the time of seizure was at the risk of subjects of the German State then at war, as purchasers, and therefore was subject to seizure on behalf of the Crown. The contention of the claimants, on the contrary, was that the cargo was their property, and therefore could not be lawfully seized.

The facts as to the contract for sale and purchase of the cargo must now be stated in substance, but briefly. For the details, the documents which were in evidence can be referred to.

I will premise that the contract, and all material transactions in relation to it up to the time of seizure of the cargo, were entered into before the war, and in entire innocence of any anticipation of war. In short, all the transactions so far as concerned the claimants were carried out in times and conditions of peace.

The claimants were the sellers of the goods, and their bankers who discounted the bill of exchange. They have made common cause, and no distinction need be made between them in this judgment. I will describe the claimants, Muir & Co., as "the sellers," and Fries & Co., the German merchants, as "the buyers."

The sellers contracted to sell the cargo to the buyers on June 25, 1914, for shipment during the month of July, 1914, from a port of U.S.A. direct or indirect to Rotterdam, at a price to include cost, freight, and insurance; in other words, the contract was what is so well known as a c.i.f. contract. Payment (or in the American terminology "reimbursement") was to be "by check against documents." The sellers were to furnish policies of insurance or certificates of insurance (free of war risk). A clause of settlement of disputes in London was included, which shews (apart from anything else) that any disputes were to be determined according to English law.

The sellers had bought the wheat, to enable them to fulfil their contract with the buyers, from C. B. Fox, a grain merchant in Galveston. The wheat was shipped by Fox at Galveston on July 23, 1914. The bill of lading was given in favour of Fox, the shipper, and was made out to the order of one Davis, or to his or their assigns. It was indorsed generally, and in due course the sellers paid Fox for the wheat and obtained the bill of lading. They did not indorse it in favour of the buyers, and

it remained a bill of lading only indorsed generally. The necessary insurances were effected, and the certificates of insurance were obtained by the sellers on July 23.

On July 28 the sellers drew a bill of exchange upon the buyers, and, according to the statement of the Attorney-General, discounted it with the bankers (the Guaranty Trust Co., of New York), who have joined them as claimants. On the same date they deposited with the bankers the bill of lading and certificates of insurance, to be delivered up on payment by the buyers through a Berlin bank of the amount due on the bill of exchange for the cost and insurance, less the freight, which was credited, as it was to be paid by the buyers on delivery.

On the same date also the original documents were forwarded to the Berlin bank for credit of the New York bank by the steamship *La Savoie*, which sailed from New York on July 29 and arrived at Le Havre on August 5; and duplicate documents were forwarded by the steamship *Carmania*, which sailed from New York on July 29 and arrived at Liverpool on August 7. The buyers were duly notified of these matters, and an invoice was forwarded to them by the sellers on the same day (July 28), with all the necessary particulars of the shipment, bill of exchange, and documents.

So far as the buyers are concerned, no further information was given to the Court except that the documents were tendered to them, and that on the tender they refused to accept the documents, or to pay the sum due under the bill of exchange, and indorsed on the bill of lading as follows: "Refused on account of late production, nearly one month after normal due date.—Colmar, Sept. 3, 1914.—GEO. FRIES."

That reason was a mere excuse; the real reason, no doubt, was that war had broken out. The sellers, therefore, or their bankers, still hold the bill of lading, and the bill of exchange remains unpaid. These, I think, are all the material facts.

The question of law, as I have stated, is, Was the cargo on September 1 subject to seizure or capture by or on behalf of the Crown as *droits of Admiralty* or as prize?

Before this question is dealt with, I desire to point out, and to emphasise, that nothing which I shall say in this case is applicable to capture or seizure at sea or in port of any property dealt with during the war, or in anticipation of the war. Questions relating to such property are on an entirely different

footing from those relating to transactions initiated during the happier times of peace. The former are determined largely or mainly upon considerations of the rights of belligerents, and of attempts to defeat such rights. I will refrain from discussing these matters, and will only refer to such authorities as *THE SALLY* (3 C. Rob. 300n.; 1 Eng. P.C. 28), heard on appeal by the Lords Commissioners of Appeals in Prize in 1795, *THE PACKET DE BILBOA* (2 C. Rob. 133; 1 Eng. P.C. 209), and *THE ARIEL* [1857] (11 Moo. P.C. 119; 2 Eng. P.C. 600), for the principles applicable in the Prize Court during a state of war.

In the case now before the Court there is no place for any idea of an attempt to defeat the rights of this country as a belligerent; and the case has to be determined in accordance with the principles by which rights of property are ascertained by our law in time of peace.

The main contest was as to the right test to apply in these circumstances for determining whether a particular property was subject to seizure or capture. Another point was taken, and argued chiefly by junior counsel for the claimants, that in any event enemy property in a British ship could not be seized in port or captured at sea.

I will state the contention and propositions submitted by the learned Attorney-General in his own words. He said: "My first proposition is that the test of the right to capture and sale is the answer to the question, On whom is the risk at the moment of capture? That is to say, Who suffers if the goods are captured? Applying that test, the American claimants here would have had a *jus disponendi*, because they are holding the bill of lading, which has not been indorsed, and therefore they would have to that extent, of course, a special property, a property interest in the cargo, but they would not have a general property in the cargo; still less would they have the risk. And there is a third proposition, which is really a development of the other proposition—namely, the American sellers had a vested right of payment, whatever happened to the goods on the tender of the documents. And I will add, as a point for my third proposition, that for the purpose of determining whether the cargo is good prize (which is quite a separate question from the other), the material question is not the abstract question of property, but whether it is an enemy or a neutral who will suffer if the cargo is condemned—on whom is the

risk?" And summing it up, the learned Attorney-General later submitted: "If my main proposition is right, in a Prize Court one is not concerned with these niceties about the abstract law of property; but the point really is, at the moment of capture, the goods being on the high seas, is it or not open to the consignor to compel payment by the consignee? That is the real test. Then plainly I am entitled here to the condemnation of the goods."

As I have intimated, it was subsequently assumed, and for this purpose agreed by the Attorney-General, that the goods were seized when afloat in port; but that makes no material difference.

The contrary contention of counsel for the claimants was that "the true criterion to apply where goods are shipped before war is, Whose goods are they? In whom is the property—in the sense of a beneficial ownership of the goods—vested?" Very difficult questions often arise at law as to when the property in goods carried by sea is transferred, or vests; and at whose risk goods are at a particular time, or who suffers by their loss. These are the kind of questions which are often brushed aside in the Prize Court when the transactions in which they are involved take place during war, or were embarked in when war was imminent or anticipated. But where, as in the present case, all the material parts of the business transaction took place *bona fide* during peace, and it becomes necessary to decide questions of property, I hold that the law to be applied is the ordinary municipal law governing contracts for the sale and purchase of goods.

Where goods are contracted to be sold, and are shipped during peace without any anticipation of imminent war, and are seized or captured afloat after war has supervened, the cardinal principle is, in my opinion, that they are not subject to seizure or capture unless under the contract the property in the goods has by that time passed to the enemy. It may be that the element of risk may legitimately enter into the consideration of the question whether the property has passed or has become transferred. But the incidence of risk or loss is not by any means the determining factor of property or ownership—cp. section 20 of the Sale of Goods Act, 1893. The main determining factor is whether, according to the intention of seller and buyer, the property had passed.

The question which governs this case, therefore, is, Whose property were the goods at the time of seizure?

This principle is consonant with good sense and with the notion of what is right in commercial dealings. It is also in accordance with the doctrines adopted by the eminent jurists who have become authorities on the Law of Nations, and applied in the decisions of our Prize Courts—see, for example, *THE COUSINE MARIANNE* (Edw. 426; 2 Eng. P.C. 85), *THE IDA* (Spinks, 26; 2 Eng. P.C. 268), *THE ABO* (Spinks, 42; 2 Eng. P.C. 286), *THE VROW MARGARETHA* (1 C. Rob. 336; 1 Eng. P.C. 149), and *THE ARIEL* [1857] (11 Moo. P.C. 119; 2 Eng. P.C. 600).

The learned Attorney-General, by the tenor of his argument, rendered it almost unnecessary for me to go through the many authorities dealing with the vesting or transfer of property under such a contract, or to discuss the question whether the property in this case had, on September 1, passed from the sellers and become vested in the buyers. He did not, as I understood, argue that the property had passed to the enemy buyers. He admitted that the neutral sellers had a *jus disponendi*, because they held the bill of lading, which was not indorsed, although possibly he may have intended to qualify this admission by saying that “therefore the sellers would have to that extent a special property” in the goods. But, at any rate, as he did not contend that by law the property had passed to the buyers, I think it sufficient to deal very briefly with the matter, and to state my conclusions without elaborating the grounds.

In my opinion, the result of the many decisions from *WAIT v. BAKER* [1848] (17 L. J. Ex. 307; 2 Ex. 1) up to *OGG v. SHUTER* (45 L. J. C.P. 44; 1 C.P. D. 148) and *MIRABITA v. IMPERIAL OTTOMAN BANK* (47 L. J. Ex. 418; 3 Ex. D. 164), and thence up to the Sale of Goods Act, 1893; of the provisions of the Sale of Goods Act, 1893, itself, following closely on these matters the judgment of Lord Justice Cotton in *MIRABITA v. IMPERIAL OTTOMAN BANK* (47 L. J. Ex. 418; 3 Ex. D. 164); and of the decisions subsequent to the Act—for example, *DUPONT v. BRITISH SOUTH AFRICA Co.* [1901] (18 Times L. R. 24), *RYAN v. RIDLEY & Co.* (8 Com. Cas. 105), and *BIDDELL BROTHERS v. E. CLEMENS HORST Co.* (80 L. J. K.B. 584; 81 L. J. K.B. 42; [1911] 1 K.B. 214 and 934),—is that in the circumstances of the present case the goods had not, at the time of seizure, passed to the buyers; but that the sellers had reserved a right of disposal

or a *jus disponendi* over them, and that the goods still remained their property, and would so remain until the shipping documents had been tendered to and taken over by the buyers, and the bill of exchange for the price had been paid.

It follows that the goods seized were the property of the American claimants, and were not subject to seizure. The Court decrees accordingly, and orders the goods to be released to the claimants.

The other point referred to remains, and as it was argued and has been foreshadowed in other cases, I will deal with it, although, in view of the decision just given, it becomes immaterial.

It was that, as the cargo was in a British ship, it could not be seized or captured, even if it was enemy property.

In my opinion, this proposition is wholly lacking in foundation. No authority was cited for it. Such a contention has never been put forward, because, as I think, no one has thought that it could prevail. Enemy property at sea or in port can be captured or seized except where an express immunity has been created. Abundance of authority exists for this in the acknowledged books of international jurists. I will only cite one—namely, Wheaton, from what is regarded as the best edition (1), that of Mr. Dana, published in 1866.

After an exhaustive and most interesting account of the right of capture according to the usage of war on land and sea, Wheaton wrote as follows: "Section 365. The progress of civilisation has slowly, but constantly, tended to soften the extreme severity of the operations of war by land; but it still remains unrelaxed in respect of maritime warfare, in which the private property of the enemy taken at sea or afloat in port is indiscriminately liable to capture and confiscation. This inequality in the operation of the laws of war, by land and sea, has been justified by alleging the usage of considering private property, when captured in cities taken by storm, as booty; and the well-known fact that contributions are levied upon territories occupied by a hostile army, in lieu of a general confiscation of the property belonging to the inhabitants; and that the object of wars by land being conquest, or the acquisition of territory to be exchanged as an equivalent for other territory lost, the regard of the victor for those who are to be or have been his subjects, naturally restrains him from the exercise of his extreme rights in this particular; whereas the object of maritime wars is the destruction of the enemy's commerce

and navigation, the sources and sinews of his naval power—which object can only be attained by the capture and confiscation of private property.”

I will also cite Mr. Dana's note upon this section, as it was written years after the Declaration of Paris: Note 171: “*Distinction between Enemy's Property at Sea and on Land.*—The text does not present the principal argument for the distinction observed in practice between private property on land and at sea; nor, indeed, has this subject been adequately treated upon principle, if that has even been attempted, by most text-writers. War is the exercise of force by bodies politic, for the purpose of coercion. Modern civilisation has recognised certain modes of coercion as justifiable. Their exercise upon material interests is preferable to acts of force upon the person. Where private property is taken, it is because it is of such a character or so situated as to make its capture a justifiable means of coercing the power with which we are at war. If the hostile power has an interest in the property which is available to him for the purposes of war, that fact makes it *prima facie* a subject of capture. The enemy has such an interest in all convertible and mercantile property within his control, or belonging to persons who are living under his control, whether it be on land or at sea; for it is a subject of taxation, contribution, and confiscation. The humanity and policy of modern times have abstained from the taking of private property, not liable to direct use in war, when on land. Some of the reasons for this are the infinite varieties of the character of such property, from things almost sacred, to those purely merchantable; the difficulty of discriminating among these varieties; the need of much of it to support the life of non-combatant persons and of animals; the unlimited range of places and objects that would be opened to the military; and the moral dangers attending searches and captures in households and among non-combatants. But, on the high seas, these reasons do not apply. Strictly personal effects are not taken. Cargoes are usually purely merchandise. Merchandise sent to sea is sent voluntarily; embarked by merchants on an enterprise of profit, taking the risks of war; its value is usually capable of compensation in money, and may be protected by insurance; it is in the custody of men trained and paid for the purpose; and the sea, upon which it is sent, is *res omnium*, the common field of war as well as of commerce. The purpose of maritime commerce is the enriching of the owner by the transit



over this common field; and it is the usual object of revenue to the power under whose government the owner resides.

"The matter may, then, be summed up thus: Merchandise, whether embarked upon the sea or found on land, in which the hostile power has some interest for purposes of war, is *prima facie* a subject of capture. Vessels and their cargoes are usually of that character. Of the infinite varieties of property on shore, some are of this character, and some not. There are very serious objections, of a moral and economical nature, to subjecting all property on land to military seizure. These objections have been thought sufficient to reverse the *prima facie* right of capture. To merchandise at sea these objections apply with so little force that the *prima facie* right of capture remains."

There is no distinction now to be made between capture at sea and seizure in port; and, apart from the practice introduced by the Declaration of Paris in favour of neutral vessels, it does not matter in what ships the cargoes seized may happen to be.

According to the Order in Council in 1665, as to the rights of the Lord High Admiral in former times, which are now the rights of the King in his office of Admiralty, "all ships and goods coming into ports, creeks, or roads of England or Ireland unless they come in voluntarily on revolt, or are driven in by the King's cruisers," belonged to the Lord High Admiral, and now belong to the Crown. And according to Lord Stowell, "Usage hath construed this to include ships and goods already come into ports, creeks, or roads, and these not only of England and Ireland, but of all the dominions thereunto belonging"—see *THE REBECKAH* [1799] (1 C. Rob. 227, 232; 1 Eng. P.C. 118, 121, 122).

It has never been urged that enemy goods are free from capture or seizure if they happen to be in British ships.

This is, no doubt, the reason why there are no reported judgments upon the point; but if decisions of Prize Courts are desired to shew that enemy cargoes in British ships have been captured, reference can be made to *THE CONQUEROR* (2 C. Rob. 303) and *THE MASHONA* [1900] (17 Cape S.C. 136; 10 Cape Times L. R. 163), and the *Journal of Comparative Legislation*, 1900, p. 326. See also *THE CARGO ex EMULOUS* [1813] (1 Gallison, 563; and on appeal, *sub nom.* *BROWN v. THE UNITED STATES* [1814], 8 Cranch, 110), for the opinion of Mr. Justice Story in similar cases.

As to the suggestion that the right of seizure or capture of enemy property carried as cargoes in British ships no longer

exists after the Declaration of Paris, it is obvious that the Declaration only modified or limited the right in favour of neutrals for the benefit and protection of the commerce of neutrals, and in the interest of international comities, and did not in any other respect weaken or destroy the general right.

It is well known that the United States of America refrained from acceding to the Declaration of Paris because they desired that all property of private persons should be exempted from capture at sea, to which other States have always refused to agree. And in practice, what would become of such cargoes? A British ship could not, in times of war, carry it or hand it over to the enemy, either directly or through any intermediary, as it is not permitted for her to have any intercourse with the enemy. In my view, it is abundantly clear that enemy goods carried in British vessels are subject to seizure in port and capture at sea in times of war.

Since the cargo has been sold, the Court will order payment out of the proceeds to the claimants.

*R. H. Balloch*, for the claimants, asked for costs.

SIR SAMUEL EVANS (THE PRESIDENT).—Assuming I have discretion in the matter of costs, it is obvious this was a proper case for investigation, and I shall exercise my discretion and say there shall be no costs at all.

On the application of the Attorney-General a stay of execution was granted for three weeks, and, if notice of appeal was given, until the hearing.

[On December 14, 1914, during the hearing of *THE ODESSA* [1914] (*post*, p. 163; [1915] P. 52) the Attorney-General announced that the Crown did not intend to appeal against the decree in *THE MIRAMICHI*.]

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*Solicitors*—Treasury Solicitor; Thomas Cooper & Co.

[*Reported by Arthur Pritchard, Esq., Barrister-at-Law.*

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## [ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). Nov. 9, 30. Dec. 14, 1914.

## THE JUNO.

*British Ship—Enemy Cargo Loaded before War—Seizure—Shipowners' Claims—Freight—Expenses of Discharge—Ship's Delay.*

*When enemy cargo, loaded before war for carriage on a British ship, is seized and ordered to be discharged in a British port, and is condemned as prize, such a sum is to be allowed out of the prize to the shipowners for freight as is fair and reasonable in the circumstances. Regard is to be had to the agreed freight—though this is not conclusive—to the extent to which the voyage has been made, the labour and cost expended or any special charges incurred in respect of the cargo before seizure and discharge, and to the benefit to the cargo from carriage until seizure and discharge. No sum is to be allowed, unless in special circumstances, for inconvenience or delay to the ship as the result of her diversion or detention for the seizure and discharge of her enemy cargo.*

*Certain parcels of German cargo were loaded shortly before the war on a British ship at Bristol for delivery at Amsterdam, and were destined for places in Germany. The ship proceeded to Swansea to load more cargo, and was kept there by her owners. After war had broken out between Great Britain and Germany these parcels were seized by the Customs officer at Swansea, and ordered to be discharged, and were condemned as prize. The shipowners claimed to receive out of the prize full freight and the expenses of discharging these parcels and of shifting the ship to a discharging berth for the purpose:—Held, that the claim to some freight and to the other expenses should be allowed, and a reference was ordered to ascertain the amount on the principles above stated.*

The claimants, the Bristol Steam Navigation Co., Lim., owners of the British steamship *Juno*, claimed full freight on three parcels of cargo on board the *Juno*, which were taken as prize in the port of Swansea, and also the expenses of discharging

the goods at Swansea and shifting the ship to a discharging berth for the purpose.

These parcels consisted of 100 bags of red earth, forty pigs of tin alloy, and a quantity of strontium ore. The value of the red earth was stated to be 16*l.*, of the tin alloy 85*l.*, and the value of the strontium ore was not known.

A claim was made by the Bedminster Smelting Co. to the tin alloy as their property, but no claim was made to the other two parcels. The claim to the tin alloy was heard in the Prize Court on November 9 and 30, 1914, and on November 30 judgment was delivered condemning all three parcels as enemy property.

The following statement of facts is taken from the judgment: "On July 28, 1914, certain parcels of cargo consisting of (1) red earth, (2) tin alloy, and (3) strontium ore, were shipped on board the *Juno* at Bristol. These parcels of cargo were destined ultimately for various places in Germany, but the sea voyage destination in each case was Amsterdam. After leaving Bristol the vessel called at Swansea to load other cargo. She finished her loading there on August 1, and was then ready to proceed on her voyage. Her owners, however, decided to delay her departure owing to the fear of complications on the Continent.

"While the vessel still lay at Swansea, the parcel of red earth was seized as enemy goods on August 20, and the parcels of tin alloy and strontium ore on August 24. Thereupon the steamship company, as owners of the vessel, claimed the freight due in respect of the goods, and other expenses and losses resulting from the seizure. I accept the final affidavit of the manager of the steamship company in proof of the arrangements and circumstances in which the goods were shipped; and therefore I need not discuss various questions which were argued as to the contracts of affreightment and bills of lading. The amended claim of the steamship company is set out in the affidavit."

The other circumstances of the shipment, according to the final affidavit of the plaintiffs' manager, were as follows:

The claimants received these parcels of goods on board the *Juno* at Bristol on July 28, 1914, without any anticipation of war between Great Britain and Germany, and they were all shipped under the claimants' bills of lading for delivery at Amsterdam.

The red earth was received from the Winford Iron Ore Co., Lim., of Bristol, with instructions to deliver it at Amsterdam on behalf of Hermann Streibel, of Cologne, and to make out the bill of lading to the order of the claimants. Accordingly a bill of lading was made out on the claimants' usual form for the red earth as shipped by the claimants for delivery "unto order or to his or their assigns" at Amsterdam, and was signed by their clerk on behalf of the master and indorsed by the clerk on behalf of the claimants, and posted to Streibel at Cologne.

The tin alloy and strontium ore were shipped by the Holland Steamship Co., of Amsterdam, through their Bristol agents. On January 21, 1906, the claimants had entered into a pooling agreement with this company to avoid competition in the carriage of goods between Bristol and Swansea and Amsterdam, by which each company was to load a steamer once a fortnight at Bristol and Swansea for Amsterdam. The Holland company had contracts with merchants on the Continent for the carriage of goods for them from Bristol, and in pursuance thereof this company shipped goods on the claimants' vessels from time to time on the terms of the claimants' bill of lading and at the claimants' tariff rates of freight. The claimants were not parties to these contracts, but carried on the terms of their own bill of lading the goods shipped by the Holland company.

Bills of lading were made out for the tin alloy and strontium ore as shipped by the agents of the Holland company for delivery at Amsterdam unto the Holland company "or to his or their assigns." These bills of lading, when signed on behalf of the master, were handed to the agents of the Holland company, and were, it was believed, sent by them to the Holland company at Amsterdam, which, after seizure of the goods as prize, returned these bills of lading to the claimants' agents at Amsterdam, who then sent them back to the claimants.

It was believed that bills of lading of the Holland company for the tin alloy and strontium ore were issued by the Bristol agents of this company for their own convenience in forwarding goods to customers on the Continent, with whom the Holland company had contracts, and that the Holland company had contracted to deliver the tin alloy at Bonn and the strontium ore at Honningen on the Rhine, and in fulfilment of these contracts had shipped the goods on the *Juno* under the claimants' bills of lading. In ordinary course the Holland company would have

paid the *Juno's* freight to the claimants, and would have forwarded the goods to their respective destinations, and have received from the consignees the through freights to which they were entitled under their contracts.

No freight was stated in the claimants' bills of lading, but the rates of freight payable under them were, in the case of the strontium ore, the same rate as the Holland company had paid for previous shipments of such goods, and in the case of the tin alloy and red earth the usual tariff rates, subject to certain rebates.

On August 25 the collector of Customs, who had previously seized the three parcels of cargo as prize, ordered the claimants to land these goods, and on September 2 the Swansea Harbour Trust landed the goods on the instructions of the claimants, who paid their charges.

In ordinary course the *Juno*, if not detained at Swansea as she in fact had been, would have arrived at Amsterdam about August 5, and would have discharged the goods into lighters at a total cost to the claimants of 21*l.* 4*s.* 11*d.*, which, deducted from the cost of discharging in Swansea (including 4*l.* 14*s.* the cost of shifting to discharging berth)—namely 64*l.* 1*s.* 9*d.*—left a balance of 42*l.* 16*s.* 10*d.* as the extra cost. Though these goods were only carried from Bristol to Swansea, the detention of the ship at Swansea, owing to having the goods on board, cost the claimants more than if the *Juno* had performed the voyage in the ordinary course. The *Juno* acted as a warehouse for the goods until they were landed by order of the collector.

Finally, as stated in the affidavit, the claimants claimed 160*l.* 5*s.* 10*d.*, being freight on the strontium ore, 112*l.* 4*s.* 5*d.*, and on the other two parcels 5*l.* 4*s.* 7*d.*, and 42*l.* 16*s.* 10*d.* as the extra cost of discharging at Swansea. The claimants had not received any freight for these parcels, or any part of the expenses of landing them at Swansea.

By the terms of the claimants' bills of lading freight and charges for these goods became due on shipment, and were in any event to be paid in cash without deduction whether ship and/or goods were lost or not lost; and the ship retained a lien on the goods for such freight and charges until paid, notwithstanding that the same were stipulated to be paid in advance, and it was provided that freight was payable by the consignee.

The first hearing of this case was on November 9, 1914, when the only bills of lading before the Court relating to the tin alloy and strontium ore were the through bills of lading of the Holland company. The case was heard afresh before the Court on November 30, when the final affidavit of the plaintiffs' manager, sworn on November 26, was before the Court, to which the claimants' bills of lading relating to the three parcels were exhibited.

*Nov. 9, 30, 1914.—A. D. Bateson, K.C., and R. H. Balloch, for the Procurator-General.*—As regards the tin alloy and strontium ore, the only real contracts were between the Holland company and the shippers under the through bills of lading, and the claimants' bills of lading are mere form, and their only purpose was to shew that the goods were shipped. The claimants and the Holland company each supplied one steamer a fortnight, and pooled the loss or profit. So the Holland company issued their own bill of lading for the *Juno*, as if it was their own ship, and no freight is stated in the claimants' bills of lading to be payable by the Holland company, and none was paid. And the claimants cannot claim under the through bills of lading, as they were not parties to them. The claimants are now, on November 30, abandoning the claim they set up until to-day, and are attempting to make a new claim for freight on these parcels under their manager's final affidavit, saying that these goods were carried under their own bills of lading; but this is an afterthought.

As regards the red earth, which was carried under the claimants' bill of lading, by its terms payment became due on shipment, and the claimants were nevertheless to retain a lien on the goods until payment was made. But the claimants failed to get freight on shipment, and as they did not carry the goods to the destination they could not enforce the lien for freight against the shippers or consignees.

As regards their claim for expenses of discharging the goods, they did not attempt to discharge before seizure, and therefore can have no claim under any implied term in the contract of affreightment. And as to the delay of the vessel, this was for their own purposes; they chose to wait at Swansea rather than risk their vessel on the voyage, and when war broke out they were prevented as British shipowners from carrying the goods

for the enemy to Amsterdam, which would have been unlawful as a trading with the enemy.

If, however, the claimants can be held entitled to any payment by the Crown out of the prize, the questions of law are—first, Is freight on goods, loaded in a British ship before war and afterwards condemned as prize, to be paid out of the prize? and secondly, Are the shipowners' charges to be so paid?

As regards freight under such circumstances, there is no case in the books, and the question appears to be as to what is equitable—see *THE FRIENDS* [1810] (Edw. 246; 2 Eng. P.C. 48)—where recaptors of a British ship claimed freight, and as the cargo had not been carried to its destination the Court had “to discover what was the relative equity between the parties,” holding itself bound under its equitable jurisdiction to consider the relation of interests under facts out of the contemplation of the contracting parties; and it was held that freight was given to a neutral vessel carrying enemy cargo because the vessel was ready to proceed, and was only stopped by “the incapacity to proceed”—that is, the seizure of the cargo—and half freight was allowed. But the *Juno* could not lawfully proceed on her voyage, and cannot rely on the incapacity of her cargo to proceed. That, too, was a case of capture and recapture at sea, and not of seizure in port.

As regards freight payable to captors, the rule is that if goods are not carried to their destination no freight is due. If it is so carried, full freight is due; but in a special case, where the cargo of a British merchant in an enemy ship seized before hostilities was brought not to its destination, but to the port which the cargo owner had stated he would have elected under the circumstances, freight was granted to the captors on that ground, and not on the vague ground that carriage to this port was beneficial—*THE DIANA* [1803] (5 C. Rob. 67; 1 Eng. P.C. 424). Here the carriage to Swansea was not even beneficial to the owner of the goods.

When captors had to restore a foreign ship engaged in an illegal contract and to pay freight, it was held that the usual rule, which in an ordinary trade would be to allow the charter-party freight, did not apply in such a trade of extraordinary risk, and the freight was left to be determined in the registry—*THE TWILLING RIGET* [1804] (5 C. Rob. 82; 1 Eng. P.C. 430)—which shews that the Court is not bound by a fixed rule. And



no freight was given to the Crown, as representing the captors of a foreign vessel detained under an embargo and afterwards condemned, as the vessel was itself incapacitated by condemnation from carrying her cargo to its destination in another country—THE FORTUNA [1809] (Edw. 56; 2 Eng. P.C. 17)—and the *Juno* was incapacitated by law from carrying on these goods. In THE COPENHAGEN [1799] (1 C. Rob. 289; 1 Eng. P.C. 138) there are *dicta* that the maxim “capture is delivery” is by no means true except where the captor succeeds fully to the rights of the enemy; and that if a neutral vessel is taken, a captor pays the whole freight on enemy’s goods on board because he represents the enemy by getting the enemy’s goods *jure belli*; and though the voyage is not completed, yet as he has prevented his completion his seizure operates as delivery. But a distinction was drawn in this case between capture and the seizure of a vessel in port, and in the special circumstances as between ship-owner and cargo owner only freight *pro rata itineris* was allowed. In THE EMANUEL [1799] (1 C. Rob. 296; 1 Eng. P.C. 141) it was held that the principle that the owner of a neutral ship carrying enemy’s goods maintains against the captor his rights against the enemy cargo owner is liable to some exceptions, and freight was refused to a neutral vessel engaged in enemy coasting trade. So also as regards enemy colonial trade—THE IMMANUEL [1799] (2 C. Rob. 186; 1 Eng. P.C. 217) and THE MINERVA [1801] (3 C. Rob. 229; 1 Eng. P.C. 301); and as to freight where a neutral ship is carrying enemy goods between the ports of allied enemies, see THE VROW HENRICA [1803] (4 C. Rob. 343; 1 Eng. P.C. 399).

The practice of British Prize Courts is said to have been to allow to a neutral ship the freight on enemy’s goods on board, except in cases where some circumstance of *mala fides* has occurred, or where the ship was adjudged to have drawn on herself the loss of freight as a penalty for an act which, though a departure from pure neutral conduct, has not made her liable to condemnation—THE ATLAS [1801] (3 C. Rob., at p. 304, Reporter’s Note).

[SIR SAMUEL EVANS (THE PRESIDENT).—That is the common rule where there is nothing against the neutral ship—cp. THE PROSPER [1809] (Edw. 72, 76; 2 Eng. P.C. 25, 26).]

Here the *Juno* could not lawfully carry the goods further as they had an enemy destination, so that she cannot say the seizure of the cargo prevented her from carrying freight.

[SIR SAMUEL EVANS (THE PRESIDENT).—Except as regards trading with the enemy a British ship should be entitled to as full rights as a neutral ship.]

And more so. As regards the charges for unloading and shifting, "the expenses incident to the unlivery of the cargo or the removal of ship and cargo, being for the benefit of all parties, are usually borne by the prevailing party. If the captors apply for the unlivery, and the property is condemned, they bear the expense; but if restitution be decreed, the expense is generally made a charge upon the cargo—but this is always in the discretion of the Court"—*Upton's Law of Nations Affecting Commerce During War* (1863), p. 430, citing *THE INDUSTRIE* [1804] (5 C. Rob. 88, 90), where the cargo was restored, but the captor was allowed against it the expenses of unlivery and warehousing. Here the order for unlivery was in favour of the *Juno*, and got her out of her difficulty as to carrying the cargo. In another view the event was a misfortune, and possibly ship and cargo should each bear a share, though the ordinary rule appears to be that expenses on cargo should be paid by cargo.

*C. R. Dunlop*, for the claimants.—The final affidavit of the claimants' manager proves that all three parcels were carried under the claimants' bills of lading. The proviso that freight was payable by the consignee does not affect the previous term that freight was payable on shipment, so that the debt was due as soon as each parcel was shipped, and the claimants had a lien on the goods for it. The Crown takes the cargo *jure belli* and *cum onere*—cp. *THE COPENHAGEN* (1 C. Rob. 289, 291; 1 Eng. P.C. 138, 140). The Crown takes the cargo with that specific lien on it—*THE TWILLING RIGET* (5 C. Rob. 82, 85; 1 Eng. P.C. 430, 431). It is argued that these British shipowners cannot recover freight because of the doctrine against trading with the enemy; but here that point does not arise, and, moreover, British ships ought not to be dealt with worse than neutral ships. British ships ought not to be encouraged to throw goods overboard, and the Crown which has gained by the goods being kept on board ought to pay this freight. The claimants base their claim for freight on their lien.

[SIR SAMUEL EVANS (THE PRESIDENT).—Is there any case which says that the whole lien must be paid off?]

The lien is for one fixed sum. In *THE ROUMANIAN* [1915] (*ante*, p. 75; [1915] P. 26) the ship brought her oil to London

instead of to its port of destination (Hamburg), and there it was admitted that the ship ought to have her freight, and no distinction was attempted to be drawn on the ground that it was a British and not a neutral ship. The cases as to claims for freight by captors do not affect this claim. *THE COPENHAGEN* (1 C. Rob. 289; 1 Eng. P.C. 138) is the only material case, which shews that capture is equivalent to delivery. The captors bear the expense of unlivery of the cargo if they apply for this, and if it is condemned—*Upton's Law of Nations Affecting Commerce During War*, pp. 429, 430. Here the goods were ordered by the collector of Customs to be discharged at Swansea. The claimants claim full freight, or freight *pro rata itineris* with expenses of shipping, which is not far different, and expenses of discharging.

*A. D. Bateson, K.C.*, in reply.—If there had been no order to discharge, the goods would have remained in the ship till the shipowners chose to discharge them, so that the order proves nothing. If they threw them overboard they would be liable at some time to the owners.

*Dec. 14.*—*SIR SAMUEL EVANS (THE PRESIDENT).*—Having stated the facts set out above, and that the three parcels of cargo had been already condemned as lawful prize, and that the claim of the shipowners was the matter remaining for adjudication, the learned Judge then proceeded: The claimants claim the full freight as having become due on shipment. Alternatively, they claim the full sum because, although the goods were only carried from Bristol to Swansea, the detention of the ship at Swansea, owing to having the goods on board, cost the claimants more than if the *Juno* had performed the voyage in the ordinary course. They also claim extra costs of discharging the goods and shifting at Swansea.

Various reported cases were referred to in argument, which related to claims by captors of ships for freight against owners of cargoes and to claims by shipowners for freight against captors or seizers of cargoes. These were all cases of neutral vessels. In none of them were British ships concerned, and counsel for the claimants said he had not been able to find any cases relating to British vessels dealing with the same subject. The position of the sea-carrying commerce of this country was

very different one hundred years and fifty years ago from that of our own day.

I have only come across one case reported in the English Prize Court affecting a British vessel in which somewhat similar questions arose; but that was a case between the owners of a ship captured, and afterwards recaptured, and the owners of cargo, and not between shipowners and captors—*THE FRIENDS* (Edw. 246; 2 Eng. P.C. 484).

I have considered all the cases referred to. It would be wrong to say that their consideration has not been helpful. Nevertheless, they are not decisions on the points now before me.

The questions I have to determine in the present case are *primæ impressionis*. They come before the Court for decision for the first time, so far as I am aware. While there are no rules of law or decisions to bind or guide the Court, the problems can, I think, be solved without great difficulty by a rational application of fair and equitable considerations. The Prize Court has always claimed to exercise equitable jurisdiction, using that term in its broadest sense, and not in its more technical Chancery meaning.

Counsel for the claimants contended that they were entitled to the full freights for two reasons—first, because by the contracts the freights were due on shipment; and secondly, because, as in the case of neutral ships in former days, capture was said to be regarded as delivery, and full freight was given to neutral shipowners; and so it should now be given to British shipowners.

For the Crown it was contended that no freight should be allowed, or, if any, not the whole freight, because an incapacity attached to the ship in the present case, as she was prevented by law from performing her contract to deliver the goods to the consignees, and because the non-completion of the voyage was not due to the “incapacity of the cargo to proceed.”

The short answer to the first contention of the claimants is, that there is no contract to which the Court can look which is applicable to the existing facts. This Court has no concern, touching the matter now in question, with the contracts between the shipowners and the shippers or cargo owners. Whatever claim the shipowners may have under their contracts is not taken away by the decision of this Court. By the very facts of the situation the shipowners could not perform their contract by carrying the enemy goods to their destination.

As to the second contention, a neutral vessel and a British vessel are not in the like case or condition. Even before the Declaration of Paris a neutral vessel had the full right to carry enemy goods into an enemy country, subject to the risk of her detention by a belligerent for the purpose of seizing the goods; and this was the foundation of the principle which, generally speaking, secured to them their full freight.

It is needless to cite the cases in which the doctrine was applied, or in which exceptions were made. But I will quote from two of the latest cases in which Lord Stowell dealt with the matter. His statement of the principle in *THE FORTUNA* (Edw. 56, 57; 2 Eng. P.C. 17, 18) is: "The general principle has been stated very correctly, that where a neutral vessel is brought in on account of the cargo, the ship is discharged with full freight, because no blame attaches to her; she is ready and able to proceed to the completion of the voyage, and is only stopped by the incapacity of the cargo."

And in *THE PROSPER* (Edw. 72, 76; 2 Eng. P.C. 25, 26): "In this Court it is held, that where neutral and innocent masters of vessels are brought into the ports of this country on account of their cargoes, and obliged to unliver them, they shall have their freight, upon the principle that the non-execution of the contract, arising from the incapacity of the cargo to proceed, ought not to operate to the disadvantage of the ship. This rule was introduced for the benefit of the shipowners, and to prevent the rights of war from pressing with too much severity upon neutral navigation."

Since the Declaration of Paris, and indeed before that by the practice adopted in the Crimean War, neutral vessels laden with enemy goods could not be prevented from continuing their voyages and so earning their freight, except where the goods were contraband, or where the pursuit of the voyage would amount to a breach of blockade—and in these cases no freight would be allowed. With British vessels it is quite otherwise; they must not carry enemy goods, or proceed on voyages for which such goods were shipped. In the present case there was accordingly an "incapacity to proceed," attributable not only to the cargo, but also to the ship.

It would not be right, however, in my opinion, to withhold from the shipowners all the freight on account of the "incapacity of the ship" where the shipment took place before war and the

voyage was partly accomplished. What, then, ought to be the rule? It is possible that even if the cargo is not carried to its destination it would be just in some cases that the whole amount of the freight should be paid. For instance, suppose an enemy cargo were shipped before the war from Australia for Hamburg, and were seized near British waters and taken to Bristol; it may be that it would be fair to pay the shipowners the full freight.

On the other hand, suppose a cargo of enemy goods had been shipped before the war from Bristol, and destined for Cameroon or Kiao Chau, and were seized, as in this case, at Swansea; it would be wholly inequitable for the shipowners to claim, or for the captors to be subject to, payment of the full freight, even though by the contract it was due on shipment at Bristol.

In the present case, where only a comparatively small part of the voyage was made, I think the whole freight ought not to be allowed. What part should be allowed I will refer to the Registrar and Merchants to say. But I must give them some direction or guidance, although no strict rule can be laid down which would be universally applicable. Cases differ greatly. The phrase *pro rata itineris* has been used in some cases. But this does not import a mere arithmetical calculation of distances or times. The only rule which I propose to state for the guidance of the Registrar and Merchants is this:

Such a sum is to be allowed for freight as is fair and reasonable in all the circumstances, regard being had to the rate of freight originally agreed (although this is not necessarily conclusive in all cases), to the extent to which the voyage has been made, to the labour and cost expended, or any special charges incurred in respect of the cargo seized before its seizure and unlivery, and to the benefit accruing to the cargo from the carriage on the voyage up to the seizure and unlivery; but no sum is to be allowed in respect of any inconveniences or delay attributable to the state of war, or to the consequent detention and seizure.

I am conscious that the rule is not precise. I doubt whether any precise rule could be laid down; but, such as it is, I am satisfied that the experience of the Registrar and Merchants will enable them to apply it so as to bring about a fair and satisfactory result.

As to the items for extra cost of discharging the goods at Swansea and shifting, I think these should go against these parcels of cargo, and should be allowed.

I have said that the claimants in the affidavit in support of their claim urged that the detention at Swansea should be taken into account, and that it would amount to the whole freight. In this particular case the fact is that the owners themselves on August 1, according to the final affidavit of their manager, "decided, owing to the political situation on the Continent, to keep the *Juno* at Swansea and await developments." Apart from this, and as the point will no doubt arise in future cases, I desire to pronounce as my opinion that no sum ought to be allowed, unless there be some special and exceptional circumstances, in respect of any delay or inconvenience which may occur to a ship as the necessary result of her diversion or detention for the purpose of seizing and making unlivery of confiscable enemy cargo. Such things, and their consequent losses, are some of the unfortunate, albeit minor, results of war to which those engaged in shipping have to submit, as other citizens must in other capacities and walks of life.

I allow the claim of the claimants to some freight, and to the special items mentioned, and order a reference to the Registrar and Merchants to ascertain the amount.

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*Solicitors*—Treasury Solicitor; Holman, Birdwood & Co.

[*Reported by Arthur Pritchard, Esq., Barrister-at-Law.*

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[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). Dec. 7, 14, 17, 21, 1914.

THE ODESSA. THE CAPE CORSO.

*Enemy Cargo—Claim of Pledgees—Accrual of Right to Sell.*

*The pledgees of bills of lading of enemy cargo, which has been properly captured, have no claim which is recognised in the Prize Court; and the fact that the right to sell has accrued to the pledgees does not make the pledgees into owners.*

## THE ODESSA.

Cause for the condemnation of cargo as prize.

The *Odessa* was a four-masted German barque, which was captured on August 19, 1914, by H.M.S. *Cavonia* and brought into Bantry Bay, and was afterwards condemned as prize.

The subject-matter of the claim in this cause was a large quantity—51,043 bags—of nitrate of soda, which was laden on board the *Odessa*. The facts, as stated in the judgment, were as follows :

“ The claimants are J. Henry Schröder & Co., of Leadenhall Street, London, a firm of which Baron von Schröder, a naturalised subject of this kingdom, and Frank C. Tiarks, a British subject, are the partners.

“ The cargo was purchased from Weber & Co. (a firm of Chilean merchants) at Valparaiso by the Rhederei-Aktien-Gesellschaft von 1896, a German company carrying on business at Hamburg. By a business arrangement between this German company and Schröder & Co., the latter accepted bills of exchange in favour of the sellers against the cargo, and received the bills of lading as security for the acceptances and the moneys payable under them.

“ The bill of lading in this instance was dated May 8, 1914, and was made out in favour of J. Henry Schröder & Co., London, or their assigns. The vessel was stated therein to be ‘ bound for Channel for orders.’

“ Fifteen bills of exchange for various amounts were accepted by Schröder & Co. on June 4, 1914, and twenty-one others on June 9. The due dates of these sets of bills were September 6 and 10, 1914, respectively, but the time of payment having been extended by proclamation, the actual dates for payment were October 19 and 24. Therefore, when Schröder & Co.’s claim was made the bills had not been met. They have since been paid, and the total sum amounts to 41,153*l*.

“ The claimants claim the cargo ‘ as being the property of British subjects, and/or as holders for full value of the bills of lading therefor,’ and ‘ as the persons beneficially interested in the cargo.’ ”

*Maurice Hill, K.C. (The Attorney-General (Sir John Simon, K.C.) and Theobald Mathew with him), for the Procurator-*



General.—By the arrangement in letters between the German buyers and the claimants, the claimants opened a credit in favour of the buyers by agreeing to accept for account of the buyers drafts of Weber & Co. on the claimants, against the cargo to be shipped by Weber & Co. for account of the buyers. The effect of the whole transaction is, first, that Weber & Co. sell and ship nitrate to the buyers; and secondly, that the claimants agree to lend money to the buyers, by paying Weber & Co. the price—the method of payment being the acceptance of a draft—and by holding the bill of lading as security for the obligation of the buyers to reimburse them; and the claimants can get reimbursement after the war. The property passed direct from Weber & Co. to the buyers as soon as Weber & Co. had obtained the claimants' acceptances and in exchange had handed the bill of lading to them for the buyers. Weber & Co. had then given up the *jus disponendi*, and the property had completely passed to the buyers—see the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, rule 5 (2), and s. 19. The conditions are fulfilled, and the property passes, when the drafts are accepted and exchanged for the bill of lading—*MIRABITA v. IMPERIAL OTTOMAN BANK* [1878] (47 L. J. Ex. 418, 423; 3 Ex. D. 164, 172) and *SHEPHERD v. HARRISON* [1869] (38 L. J. Q.B. 105, 112; L. R. 4 Q.B. 196, 204, 205). The claimants were named in the bill of lading as consignees. This might raise a presumption that they were the owners, but that is rebutted by the evidence that they were so named only for the purpose of holding it as a security. The naming of a person as consignee in the bill of lading does not pass the property to him, as he may be so named as being agent or as having some interest less than property. The claimants could not have sued on the bill of lading, because the property did not pass by reason of the consignment—*Carver's Carriage by Sea* (5th ed.), § 62, and Bills of Lading Act, 1855 (18 & 19 Vict. c. iii.), s. 1. If the bill of lading had been to order and had been indorsed to the claimants, there would be the same question as to whether the indorsement was intended to transfer the property in the goods or, for instance, to pledge the goods—*SEWELL v. BURDICK* [1884] (54 L. J. Q.B. 156, 162, 163, 172, 173; 10 App. Cas. 74, 84-86, 105). The Prize Court will look behind the bill of lading to find out whether the property is in the consignee or not—*THE ABO* [1854] (Spinks, 42; 2 Eng. P.C. 285), where further proof was allowed as to whether the property was in the British shipper or in the named enemy.

consignee; so also in *THE PACKET DE BILBOA* [1799] (2 C. Rob. 133; 1 Eng. P.C. 209) the question was whether the legal title was in the British shipper or in the enemy consignee. This case differs from *THE MIRAMICHI* [1914] (*ante*, p. 137; [1915] P. 71), as here the seller has been paid in accordance with the contract of sale, and the claimants have given credit, not to the sellers, but the buyers, and the property is in the buyers subject to the pledge to the claimants. The case is governed by *THE IDA* [1854] Spinks, 26, 36; 2 Eng. P.C. 268, 280), where it was held to be an established doctrine that no lien on property, however honest, affords ground for its restitution; even mortgagees of property cannot in the Prize Court get any relief in respect of it—*THE MARIE GLAESER* [1914] (*ante*, p. 38; [1914] P. 218).<sup>1</sup>

*Mackinnon, K.C.*, and *C. R. Dunlop*, for the claimants.—This case is of the first importance, as the bill of exchange on London is the general means all over the world of financing the owner of any cargo during its carriage; and bankers would have been in consternation if they had thought that in case of war their security would be gone. It is desirable that this case should be decided by the Prize Court, and not that it should have to be referred afterwards to the Prize Claims Committee. The claimants admit that there are precedents which might be followed so as to condemn this cargo without recognition of their claim. But decisions in the Prize Courts in former wars are less binding as precedents than previous decisions are in a civil Court, because the principles of International Law which are administered by

(1) The Attorney-General here intervened and stated that he had authority for saying that a committee, called the Prize Claims Committee, had been constituted for the consideration of claims of third parties interested in ships or cargoes condemned by the Prize Court, in order that the law laid down by the Court as to charges over ships or cargoes might not lead to hardship in cases where it was right that the British, allied, or neutral subjects should receive compensation. He was not saying this to prejudice this case, in which it might be that the Court would be able to give the relief asked; but he wished to make the statement with as much publicity as possible, as otherwise the claims of the Crown might lead to the false impression that they were designed to prevent all consideration of claims which, it might be, had merit behind them, although they did not justify a decision in their favour in the Prize Court. It would be important, if the decision in this case were in favour of the Crown, that it should not be supposed that the authorities responsible should think themselves relieved from the consideration of *bona fide* claims arising outside the Court.

this Court are constantly changing and growing in accordance with the development of trade, the practice of nations, and new international contracts. For instance, under the Declaration of London, 1909, art. 60, a former owner of enemy goods on an enemy vessel, if he is a neutral, may exercise a certain right of stoppage *in transitu* in certain circumstances, and thus now save the goods from condemnation. Again, Dr. Lushington said in *THE IDA* (Spinks, 26, 29; 2 Eng. P.C. 268, 272), referring to the contention that, as the bill of lading was not indorsed, the property at common law remained in the shipper, and that the law of the Prize Court was the same: "If you can establish that the common law and the law of the Prize Court as to property or ownership are identical, you will prove wonders." But now in the Prize Court, in deciding questions of property, the law to be applied is the ordinary municipal law governing contracts for the sale and purchase of goods—*THE MIRAMICHI* (*ante*, p. 137; [1915] P. 71, 77).<sup>2</sup> Therefore this case cannot be governed altogether by *THE IDA* (Spinks, 26, 29; 2 Eng. P.C. 268, 272), as trade and principles of law have developed since then; also that case was decided on the point of false papers, so that the opinion on the other point is *obiter*. Moreover, as regards the claimants in the present case, who have advanced the money, the Prize Court will take into consideration that they are British, and that "it would be a harsh measure to make British merchants sustain the loss of money so expended"—*THE BELVIDERE* [1813] (1 Dod. 353, 358; 2 Eng. P.C. 183, 186); see also *THE VROW SARAH* [1803] (1 Dod. 355*n.*; 2 Eng. P.C. 185*n.*) and *THE AINA* [1854] (Spinks, 8, 11; 2 Eng. P.C. 247, 250).

In substance the interest of the claimants in this cargo is such that they ought not to be deprived of it. No doubt in legal analysis they are regarded as pledgees—*SEWELL v. BURDICK* (54 L. J. Q.B. 156; 10 App. Cas. 74)—and they are not the owners in the sense of having the absolute property against all the world.

(2) The conflict of principle, suggested to exist in these cases, is more apparent than real. In *THE IDA* (Spinks, 26, 29; 2 Eng. P.C. 268, 272) the goods were shipped, as explained in the judgment, under false bills of lading, in anticipation of war. In *THE MIRAMICHI* (*ante*, p. 137; [1915] P. 71, 77), as explained in the judgment, the shipment took place before war was anticipated. And, as appears from each judgment, the common law as to transfer of property does not apply in the Prize Court in the first circumstances, but is applied in the second—*THE IDA* (Spinks, at p. 29; 2 Eng. P.C., at p. 272) and *THE MIRAMICHI* (*ante*, p. 137; [1915] P., at pp. 76, 77).—REPORTER'S NOTE.

They have, however, the beneficial ownership; and they have as full rights as mortgagees have. The distinction between a mortgage and a pledge is minute, when the pledgee is in possession; it is analysed in MORRITT, *In re* [1886] (56 L. J. Q.B. 139, 142; 18 Q.B. D. 222, 232, 233). Also in SEWELL *v.* BURDICK (54 L. J. Q.B. 156; 10 App. Cas. 74) the goods were deliverable under the bills of lading to the shipper or assigns, and the shipper indorsed the bills of lading in blank; whereas here the claimants were named as the consignees and as against the shipowner had an absolute right to the goods, and as against a third party could sue for conversion—BRISTOL AND WEST OF ENGLAND BANK *v.* MIDLAND RAILWAY Co. [1891] (61 L. J. Q.B. 115, 117, 118; [1891] 2 Q.B. 653, 660) and THE WINGFIELD [1901] (71 L. J. P. 21; [1902] P. 42).

[SIR SAMUEL EVANS (THE PRESIDENT).—Ought these claimants to be regarded in any sense as owners of the goods? What would have been their position if they had only advanced part of the value?]

Then they might only be pledgees for that amount. The position of bankers, when like the claimants they accept for buyers, is the same as when they discount an acceptance for sellers as in THE MIRAMICHI (*ante*, p. 137; [1916] P. 71). The sellers' obligation under the contract of sale to tender the bill of lading does not depend on whether the goods are lost or not—GROOM, LIM. *v.* BARBER [1914] (84 L. J. K.B. 318; [1915] 1 K.B. 316). The claimants could have assigned their pledge of the goods, or could have re-pledged them; as to the effect of a re-pledge, see NICHOLSON *v.* HOOPER [1838] (4 Myl. & Cr. 179).

[SIR SAMUEL EVANS (THE PRESIDENT).—Would it not be necessary for the Court to go into the question of account between the German buyers and the claimants, as the former may not be indebted to the latter to the full amount of the acceptance?]

If the goods are condemned, the condemnation should be subject to satisfaction of the amount of the pledge out of the proceeds—see *per* Livingston, J., in THE FRANCES [1914] (8 Cranch (Amer.), 418, 420). As regards the old precedents in the Prize Court for not recognising liens, one chief ground was that the liens were unknown to the captor—THE TOBAGO [1804] (5 C. Rob. 218; 1 Eng. P.C. 456) and THE MARIANNA [1805] (6 C. Rob. 24; 1 Eng. P.C. 518), both cited in THE MARIE GLAESER (*ante*, p. 38; [1914] P. 218).

[SIR SAMUEL EVANS (THE PRESIDENT).—If THE MARIE GLAESER (*ante*, p. 38; [1914] P. 218) is good law, you must distinguish this case of a pledgee of goods from the case of a lien on a ship.]

A lien on a ship is different, because a ship carries distinctive documents and a label of national character. The goods bear no label of national character. Their only label of title is the bill of lading. Here the claimants are not, as in the case of a ship, setting up a right unknown to the captor. The claimants are the consignees named in the bill of lading, and it is only by importing other law than that of the Prize Court that the Court can find the person named to be a pledgee instead of a full owner. Also it is established that the captors take *cum onere* to a certain extent; one kind of lien on goods must be recognised in the Prize Court, that of freight—THE TOBAGO (5 C. Rob. 218; 1 Eng. P.C. 456). The true criterion of property for the purpose of condemnation is that, if you are the person on whom the loss will fall, you are to be considered as the proprietor—THE PACKET DE BILBOA (2 C. Rob. 133, 136; 1 Eng. P.C. 209, 211). The true principle on which capture depends is the destruction of the resources of the enemy; it is open to question whether this aim is attained by forfeiting the pledges of friendly pledgees. There have been cases in the present war where German owners insured by underwriters in the United States have desired their property to be condemned in the British Prize Court.

THE CARLOS F. ROSES [1900] (177 U.S. 655) is distinguishable; there the claimants were neutrals and not nationals of the United States, while here the claimants are British. In THE AMY WARWICK [1862] (2 Sprague, 150, 156) it was declared that the strict legal title is not the limit, but the claim is to be allowed where the claimants are "trustees holding the legal title and possession with a right of retention until their advances should be paid."

The principle of all the cases is that the Prize Court recognises a *jus in re*, but not a *jus in rem*, unless the latter is a lien which is part of the general law; that is to say, as a rule a lien, which needs to be enforced by the process of the Court, will not be recognised. It is on this ground that holders of liens have failed—THE TOBAGO (5 C. Rob. 218, 222; 1 Eng. P.C. 456, 457), THE NIGRETIA [1905] (2 Russ. & Jap. P.C. 208), THE RUSSIA [1904] (Takahashi, 567), THE HAMPTON [1866] (5 Wall. 372), and THE MARIE GLAESER (*ante*, p. 38; [1914] P. 218). Here

the claimant has a *jus in re*, and therefore his interest should not be condemned—*THE TOBAGO* (5 C. Rob. 218, 222; 1 Eng. P.C. 456) and *THE FRANCES* (8 Cranch (Amer.), 418). Also the rights of a pledgee are as much part of the general law as the right of the shipowner to his freight, and therefore are protected.

*The Attorney-General (Sir John Simon, K.C.)*, in reply.—There are five answers to the claim. First, it is admitted that this property belongs to an enemy, and that the claimants are pledgees. Those were the exact facts in *THE IDA* (Spinks, 26; 2 Eng. P.C. 268). The main ground of that decision was not false papers, but lien, as shewn by the headnote and judgment. Secondly, the claim is contrary to the judgment in *THE MIRAMICHI* (*ante*, p. 137; [1915] P. 71), which cited *THE IDA* (Spinks, 26; 2 Eng. P.C. 268), and relied on the proof of property. Thirdly, the contention of the claimants is contrary to the reasoning in *THE MARIE GLAESER* (*ante*, pp. 38, 49; [1914] P. 218, 228). Fourthly, it cannot be argued that the claim of a holder of a respondentia bond on cargo, or of a mortgagee of a ship, are to be recognised; yet each of these interests is higher than that of a pledgee. Fifthly, if this kind of claim were allowed, the Court would have to go into the *minutiae* of accounts between the pledgee and the enemy owner to ascertain the real interest of the pledgee. Also *THE CARLOS F. ROSES* (177 U.S. 655) is a formidable obstacle to the claimants.

*Cur. adv. vult.*

#### THE CAPE CORSO.

Cause for the condemnation of cargo as prize.

The subject-matter of the claim in this case was a large quantity of valuable wood laden on board the British steamship *Cape Corso*. She was detained at Suez for some days on August 7, 1914, and afterwards, and this cargo was seized on the arrival of the vessel at Brixham on August 26.

William Brandts, Son & Co., of Fenchurch Avenue, London, a firm of British subjects, claimed this parcel of wood, and are hereafter referred to as "the claimants." The owners of the *Cape Corso* claimed certain freight and charges. The facts, as stated in the judgment, were as follows:

"The cargo was purchased from one Schütze of Otaru in Japan by one Leo Küpper, of Hamburg, a German subject. The vessel was chartered to Küpper. The goods were shipped in

Japan, and the vessel was bound for Rotterdam, or, at the option of the charterer, for Hamburg.

"By a business arrangement between Küpper and the claimants, the latter gave to Mitsui & Co., in London, on behalf of their house at Otaru, letters of credit authorising them to negotiate drafts of Schütze on the claimants for the cargo purchased from him by Küpper. A certain number of bills of exchange were accepted by the claimants before the war, which fell due after the war, but which have now been paid.

"The bills of lading were made out to Schütze's order or assigns, and were indorsed generally by Schütze. They were in due course received by the claimants as security against their acceptances. The claimants then forwarded them to their agent at Hamburg to deliver up to Küpper against payment, and some of them were presented before the war. Certain collateral securities were given to the claimants by Küpper, in part by a guarantee of the Rheinische Creditbank Filiale Karlsruhe, and in part by a deposit with the claimants' agent in Hamburg. The transactions were not quite so simple as" in the previous case of THE ODESSA. "Their effect has been stated, and no further details need be given.

"The balance of account stated by the claimants to remain due from Küpper is 6,104*l*.

"The claim was formulated by the claimants as follows:

A (1) A declaration that the goods are their property.

(2) Release to them of the said goods.

"Alternatively—

B (1) A declaration that they are entitled to possession of the goods.

(2) Release of the goods to the claimants for the purpose of sale and retention by them out of the proceeds of sale of the amount paid by them for the bills of lading and of the amount of costs, losses and expenses (if any).

(3) Alternatively, for payment to them, out of the proceeds of sale of the goods, of the amounts referred to in (2).

"In reference to the transactions between them, the claimants in writing to their German customer Küpper said, 'We shall be pleased to finance the wood shipments from Mr. Carl Schütze for your account on the basis as sketched by you.'

"Just as Brandts, Son & Co. financed the wood shipments for their customer, so did Schröder & Co. finance the nitrate shipments for their customers, the Rhederei-Aktien-Gesellschaft von 1896."

*Dec. 17, 1914.—Maurice Hill, K.C., and R. H. Balloch, for the Procurator-General.*—Those claimants made their advance on the security of the bills of lading, Küpper's personal credit, and the guarantee of the German bank. This is not so simple an accounting as in the previous case, but the decision on the principle as to whether pledgees' rights can be recognised will determine this case. The claimants ask for a condemnation subject to their rights as pledgees, or for release. If the goods were released, the claimants would become trustees for the German owner of the balance beyond the amount for which they credited him, and the enemy owner could raise money on this debt in a neutral country. This increases the enemy's credit, and it is on that ground that awards of salvage have been refused by arbitrators to Germans during the war. If the condemnation were subject to the pledgees' rights, the enemy owner would to that extent have his resources increased by payment of his debt to the claimants; and also an account would have to be taken between the claimants and the enemy owner in the absence of the latter. It may be that the claimants can be relieved by the bounty of the Crown without releasing the enemy owner, but this cannot be done by the Court.

*Stuart Bevan, for the claimants.*—The argument for the claimants in the previous case applies to these claimants. But even if those claimants fail, these claimants should succeed. The claimants here took the German bank's guarantee not as a secondary security, but as an essential part of their security. And there was a default in the German bank's guarantee as regards the bill of lading for 2,83½ logs, as is shewn by the letter of the German bank to Ludwig Tillmann on July 27, 1914. The default took place before the seizure of the cargo. On default pledgees gain an immediate right to sell; this is admitted. The claimants therefore on default became owners of some unascertained portion of this parcel, and on sale would become owners of that portion of the proceeds. As to the remainder of the shipment, the position is different. The bills of lading for the remainder have been returned by Tillmann to the claimants,



and no doubt were presented to the German bank at about the same date as the other bill of lading. Therefore it appears that the claimants' right to sell the remainder arose also before seizure.

[SIR SAMUEL EVANS (THE PRESIDENT).—Do pledgees by mere possession of the right to sell change from pledgees to owners?]

Yes, without doing anything. Pledgees can appropriate without a sale, as would clearly be the case with bullion or investments.

*Maurice Hill, K.C.*, in reply.—The evidence even as to refusal by the German bank to accept the documents as regards the 2,834 logs is thin; and the fact that the other bills of lading were returned does not prove refusal. But in any case the claimants remain only pledgees. The rights of pledgees on default no doubt include a right to sell besides their right of possession, which is a kind of property—MORRITT, *In re* (56 L. J. Q.B. 139, 142; 18 Q.B. D. 222, 232), *per* Lord Justice Cotton: "It is out of the possession given him under the contract that the pledgee's rights spring." But the pledgee has only a special property in the goods, and the general property remains in the pledgor; and on default the pledgee has no right to re-vest the property in himself, but has only the power to sell—HUBBARD, *Ex parte* [1886] (55 L. J. Q.B. 490, 492; 17 Q.B. D. 690, 698).

*Darby*, for the owners of the *Cape Corso*, contended that they were entitled to certain freight and demurrage and other charges.

[The Court referred to the Registrar and Merchants the claim for freight under the same directions as in *THE ROUMANIAN* [1914] (*ante*, p. 75; [1915] P. 26), and the reasonable extra charges for delivering this cargo in the more expensive port of London, chosen by the Crown, instead of in the port of Rotterdam, and disallowed the claims for demurrage and certain other expenses.]

*Cur. adv. vult.*

*Dec. 21.*—SIR SAMUEL EVANS (THE PRESIDENT) read the following judgment: The claims to the cargoes in these two cases are of a like nature. There is no difference between them in any matters essential for my judgment, and the principles applicable must be the same in both. I will therefore deal with them together. [The learned Judge stated the facts in both

cases as already set out, and proceeded:] It was admitted for the claimants in each case, first, that in law the property in the cargoes had been transferred to and become vested in the German purchasers, and that the latter were at all material times the legal "owners" of the cargoes; and secondly, that the claimants were merely pledgees of the bills of lading representing the cargoes as security for moneys advanced or agreed to be advanced.

The important questions of law now raised are whether the Prize Court should nevertheless regard the claimants as the real owners of the goods, and should therefore release the goods captured on the ground that they were not "enemy property"; or whether the Court should in some way take cognisance of their claims, and direct the captors or the Marshal to pay them out of the proceeds.

The argument was presented ably and persuasively by Mr. Mackinnon, and the Court is indebted to him for his assistance. He admitted that no decisions of this or any other Court of Prize had given effect or even lent countenance to such a claim; but he urged that, side by side with the development of commercial dealings on the lines of those now presented, there should be such an extension of the law of prize as would protect people who, like the claimants, lent money on the security of cargoes or their bills of lading.

At the outset, two things must be remembered: first, that this is a Court of law; and secondly, that the law to be administered here is the Law of Nations—that is, the law which is generally understood and acknowledged to be the existing law applicable between nations by the general body of enlightened international legal opinion.

The decisions of a Court of law should proceed upon defined principles. Those principles have to be applied to ever-varying sets of facts. But the Court has the function and duty not merely of deciding individual cases, but of determining them upon principles which shall be a guide to others as to what their positions and rights are in the eye of the law.

In the domain of International Law, in particular, there is room for the extension of old doctrines or the development of new principles, where there is, or is even likely to be, a general acceptance of such by civilised nations. Precedents handed down from earlier days should be treated as guides to lead, and

not as shackles to bind. But the guides must not be lightly deserted or cast aside. Already, in the course of the present war, I have had to deal with questions not remote from those raised in these proceedings; and in dealing with them I have striven after careful consideration to decide them in this spirit, with the guidance of the past and in the light of later experience.

In *THE MARIE GLAESER* (*ante*, p. 38; [1914] P. 218) the positions of owners of enemy vessels, and of other persons, neutral and British subjects, claiming liens or charges upon the vessels, fell to be decided.

In *THE MIRAMICHI* (*ante*, p. 137; [1915] P. 71) rules for determining the "ownership" of cargoes laden on an innocent ship had to be laid down.

In *THE MARIE GLAESER* (*ante*, p. 38; [1914] P. 218) the decision was that in cases of capture no mortgages, liens, or charges upon an enemy ship could be set up in this Court against the captors.

In *THE MIRAMICHI* (*ante*, p. 137; [1915] P. 71) it was held that in cases of seizure the "ownership" of or "property" in a cargo shipped during peace depends upon the municipal law governing contracts for the sale and purchase of goods.

I must adhere to those decisions, unless and until they are corrected by a higher tribunal; and must apply the principles on which they were founded consistently to the facts of the present claims, unless there is good reason in reference to these cargoes for adopting different tests or doctrines.

As to the charges, or liens, no doubt a distinct line could be drawn between ships and cargoes laden in them, if it were deemed right to make such a distinction. But it has never yet been made, I think, in any authority by the Prize Court of any nation. The reasons for not allowing any charges or liens against ships are set out in *THE MARIE GLAESER* (*ante*, p. 38; [1914] P. 218), and the many authorities therein cited. Some of these authorities related to cargoes, and the same reasons were applied. I will not go over the same ground again. But I will just refer to three instances as examples where cargoes were dealt with upon the same footing, covering the century from the time of Lord Stowell in 1805, through the period of the Crimean War in 1854, up to the Spanish-American War in 1900. They are *THE MARIANNA* (6 C. Rob. 24; 1 Eng. P.C. 518),

THE IDA (Spinks, 26; 2 Eng. P.C. 268), and THE CARLOS F. ROSES (177 U.S. 655).

It appears to me that it is impossible to distinguish the two last-named cases from those with which I am now dealing. Nor do I see any reason for running counter to them.

In the first case now before the Court (THE ODESSA), the vessel and the cargo are both "properties" belonging to enemy subjects. What reason of any validity, or even plausibility, can there be for barring the claims of British or neutral subjects having liens or charges upon the vessels, and at the same time allowing similar claims against the cargoes? I can see none.

Accordingly, upon authority and principle, inasmuch as the claims of Schröder & Co. and Brandts & Co. are founded upon their positions as pledgees and not legal owners, they cannot, in my judgment, be allowed.

But it was further argued that, although the claimants were not the legal owners of the cargoes, they had such a beneficial interest therein that their claims should be allowed. To accede to this proposition would be to open a door for all sorts of enquiries and calculations, which has been consistently and firmly closed by my predecessors and by Courts of Prize. A consideration of the circumstances in the case of Brandts & Co.'s claim will at once shew the difficulties. In the initial stage, how would a captor, who may have had good reason to believe that the cargo seized was enemy property, know how to act if he had to consider before seizure, or knew he might be confronted after seizure with, claims from pledgees or money-lenders in various parts of the world, whose advances might be either 5 per cent. or 95 per cent. or any other proportion of the value of the goods? Or if he might be subject to the taking of a general account as between banker and customer, or guarantor of customer, in order to ascertain the extent of the alleged charge or lien? When a later stage is approached, what would the captors or the Marshal have to do? Are they to be parties to the taking of an account between the pledgors and pledgees, or persons possibly claiming under them—an account which *ex hypothesi* would during the war have to be taken in the absence of some of the parties? Such proceedings would be wholly foreign to the jurisdiction and working of this Court.

That persons may be losers during war time in pecuniary or commercial transactions with enemy traders is only too

obvious. Loss is no test of legal rights. The claimants have rights of action against their customers for their full claims, which they can set in motion either during the war or after it. How far they might be fruitful is no concern of this Court.

In my judgment, the only safe guiding principle is to ascertain who are the legal owners of the cargoes; and, if the goods are found to be the property in law of an enemy, to condemn them; or if they are the property of neutrals or British subjects, to release them, as was done in *THE MIRAMICHI* (*ante*, p. 137; [1915] P. 71).

There is one other matter to mention relating to the second case, lest it may be thought that it has been overlooked. Counsel for Brandts & Co. contended that in regard to part of the cargo claimed—namely, 2,834 logs—both Küpper and his guarantors, the Rheinische Creditbank Filiale Karlsruhe, had before the outbreak of hostilities and capture refused to take up the bills of lading, and that thereupon the pledgees could have sold. Even if the fact of refusal were established, it is clear that, until the pledgees did sell, the general property in the goods remained in the owners, who had at any time the right to redeem.

I may further note that the facts upon this head were precisely similar in *THE CARLOS F. ROSES* (177 U.S. 655); the statement of them to be found at page 679 of the report is as follows: "The purchase of the goods, the drawing and cashing of the drafts, the indorsement and delivery of the bills of lading, all took place before the sailing of the vessel, and long before the declaration of the war, and before there was any reason to anticipate hostilities. The drafts were accepted before the war, and were paid before the seizure of the vessel." Nevertheless it was held that the claimants had no right to the goods as against the captors.

My judgment therefore is that in none of the forms suggested can the claims in either case be allowed; and I must condemn the cargoes in both cases as lawful prize.

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*Solicitors*—Treasury Solicitor; Stibbard, Gibson & Co., for claimants in *Odessa*; Coward & Hawksley, Sons & Chance, for claimants in *Cape Corso*.

[*Reported by Arthur Pritchard, Esq., Barrister-at-Law.*]

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). Feb. 8, 22, 1915.

## THE CORSICAN PRINCE.

*Jurisdiction—Freight—Release of Cargo Seized as Prize—Claim by Shipowner in Prize Court—Cargo Owner's Claim in King's Bench Division.*

*The jurisdiction to determine questions as to the right of the shipowner to freight on cargo which has been seized as prize is in the Prize Court and not in a Court of common law, although the cargo has been released without being brought before the Prize Court for adjudication.*

Summons adjourned into Court for argument.

The summons was issued by the Prince Line, Lim., the owners of the steamship *Corsican Prince*, and directed to the Russian Bank for Foreign Trade and the Société Générale de Paris (as owners of portions of the cargo lately laden on board the vessel), and to the Procurator-General, "to shew cause why it should not be pronounced that the Prince Line, Lim., are not entitled to be paid out of the proceeds in Court of the cargo . . . the amount of the freight and other moneys payable in respect of the transportation of the cargo, and expenses and demurrage, and why it should not be referred to the Registrar . . ."

The material facts, which are mainly taken from the judgment, were as follows: The cargo on the *Corsican Prince* consisted of 250,000 poods of barley. It was loaded at Odessa, the loading being completed on August 3, 1914, after war was declared between Russia and Germany. It was all consigned to Hamburg. The Russian authorities raised difficulties about the ship leaving, but afterwards allowed her to sail on an undertaking by the master to call at Malta, Gibraltar, and Falmouth. She arrived at Falmouth and was ordered by the Marshal to Liverpool. She was detained, and afterwards, on October 29, her cargo was seized. Upon the application of the Marshal, an order was made by the Prize Court for the sale of the cargo to prevent its deterioration, and for the payment of the proceeds into Court.

On November 12 a writ was issued by the Procurator-General claiming the condemnation of the cargo, or its proceeds, as prize.

The whole cargo was sold for about 29,800*l.*, and the net proceeds, amounting to about 28,600*l.*, were paid into Court.

Appearances were entered by the Russian Bank claiming as owners of part of the cargo—namely, 51,500 poods; by the Société Générale, on behalf of the Petrograd International Bank of Commerce, claimants as to other parts—namely, 46,280 poods; and by the Prince Line, Lim., as owners of the vessel.

After the sale of the cargo, an order was made, with the consent of the Procurator-General and of the claimants, in these terms: "Upon consent of H.M. Procurator-General, it is ordered that he do pay out to the Russian Bank for Foreign Trade the net proceeds of sale of 51,500 poods of barley *ex* the above vessel upon production of the copy bills of lading, payment of any charges which may have been incurred in connection with the detention thereof, and subject to any rights as to freight which the shipowners may have had over the goods at the date of the seizure thereof." A similar order was made in favour of the Société Générale in respect of 46,280 poods.

The Prince Line, Lim., as claimants for freight, demurrage, and charges, entered a *caveat* against the payment out of Court of any of the proceeds without notice to them.

On January 13, 1914, the Russian Bank issued a writ in the King's Bench Division claiming a declaration that they were entitled as shippers, or as holders of the bills of lading, to the proceeds of the goods free of lien for freight. On January 22 the shipowners took out a summons to stay the King's Bench action, and on January 25 the Russian Bank issued a cross-summons to transfer that action to the Commercial Court. These summonses came before Bailhache, J., who adjourned them. On January 26 the present summons by the shipowners was taken out in the Prize Court.

*Maurice Hill, K.C.*, and *R. H. Balloch*, for the shipowners.—This matter is within the exclusive jurisdiction of the Prize Court. Claims arising out of a seizure of property as prize have always been dealt with in the Prize Court—even such matters as actions for false imprisonment—*LECAUX v. EDEN* [1781] (2 Dougl. 594) and *LINDO v. RODNEY* [1782] (*Ibid.* 613*n.*); and see Story's *Notes on the Principles and Practice of Prize Courts*, pp. 30 and 31. The jurisdiction arises on capture, and it is immaterial whether the subject-matter has remained in the hands of the Court or not—

FAITH *v.* PEARSON [1815] (4 Camp. 357). The question of jurisdiction is not merely technical, because in certain cases, by the rules of the Prize Court, freight would be allowed where the common law would refuse it—for example, where the goods had not been carried to their port of destination; and conversely, where at common law freight would have been earned, the Prize Court might refuse it—for example, if the ship had carried false papers—see THE ANNA CHRISTIANA [1778] (Hay & Marriott, 161). Therefore questions of freight on a captured cargo are peculiarly within the exclusive jurisdiction of the Prize Court, which has constantly dealt with such claims—see SMART *v.* WOLFF [1789] (3 Term Rep. 323), THE COPENHAGEN [1799] (1 C. Rob. 288; 1 Eng. P.C. 138), THE DIANA [1803] (5 C. Rob. 70; 1 Eng. P.C. 424), THE TWILLING RIGET [1804] (5 C. Rob. 82; 1 Eng. P.C. 480), THE FRIENDS [1810] (Edw. 246; 2 Eng. P.C. 48), THE RACEHORSE [1800] (3 C. Rob. 101; 1 Eng. P.C. 261), THE MARTHA [1800] (3 C. Rob. 106; 1 Eng. P.C. 263), THE ISABELLA JACOBINA [1801] (4 C. Rob. 77), and THE FORTUNA [1802] (4 C. Rob. 278; 1 Eng. P.C. 392); see also THE HOFFNUNG [1805] (6 C. Rob. 231; 1 Eng. P.C. 550) and the American cases of THE ANTONIA JOHANNA [1816] (1 Wheaton, 159) and THE NASSAU [1866] (4 Wall. 634). Further, the Russian Bank has obtained the release of a portion of the cargo on terms, and must be taken to have consented to the jurisdiction of the Prize Court. The rest of the claims must be dealt with in this Court, and it is imperative that there should be only one set of rules applied.

[Reference was also made to Order XXVII. rule 3 and Order XLV. of the Prize Court Rules, 1914, and to sections 3 and 4 of the Naval Prize Act, 1864 (27 & 28 Vict. c. 25), and section 4 of the Supreme Court of Judicature Act, 1891 (54 & 55 Vict. c. 53).]

*Aspinall, K.C.*, and *R. A. Wright*, for the Russian Bank for Foreign Trade.—It is admitted that the Prize Court has jurisdiction in all matters which can be called ancillary to prize matters; but in this case, instead of proceeding to adjudication, the captor has restored the property to the claimants, and from that time it ceased to be subject to prize jurisdiction, and the parties are restored to their common law rights. At common law the ship-owners would not be entitled to freight as the bill of lading contract has not been carried out, whereas in the Prize Court they may be given *pro rata* freight.



[SIR SAMUEL EVANS (THE PRESIDENT).—If the Russian Bank obtained their declaration in the King's Bench Division that they were entitled to the proceeds free of lien for freight, how would they get their money?]

They would have to come with their judgment to this Court and argue that the *caveat* against payment out should be withdrawn, and that the proceeds should be released to them.

The proposition of the shipowners, that any dispute indirectly connected with the captured *res* is within the exclusive jurisdiction of the Prize Court is much too wide. Although the jurisdiction of the Prize Court has attached, it may be lost by voluntary discharge—HUDSON *v.* GUESTIER [1808] (4 Cranch, 293), 2 Wheaton, Appendix, p. 2, and Upton's *Law of Nations* (3rd ed. 1863), p. 389. See also THE TWO FRIENDS [1799] (1 C. Rob. 271) and LUKE *v.* LYDE [1759] (2 Burr. 883). In LECAUX *v.* EDEN (2 Dougl. 594) there had been no voluntary release of the property, and in the other cases cited on the question of freight the matters either arose after decree, or the jurisdiction was not questioned. Order XXVII. rule 3 of the Prize Court Rules, 1914, only provides for the case where the subject-matter has come before the Court for adjudication.

L. F. C. Darby, for the Société Générale de Paris, adopted the arguments of counsel for the shipowners, and desired the question to be decided in the Prize Court.

T. H. T. Case, for the Procurator-General, took no part in the argument.

*Cur. adv. vult.*

Feb. 22.—SIR SAMUEL EVANS (THE PRESIDENT).—This is a summons which came before me in chambers, and which I adjourned into Court for argument.

It is a summons issued by the Prince Line, Lim., the owners of a British steamship, the *Corsican Prince*, in effect asking for directions for the assessment of the amount of freight and other moneys claimed by the shipowners, and for payment of the amount so assessed out of the proceeds of the cargo now in Court in these prize proceedings.

Part of the cargo was claimed by the Russian Bank for Foreign Trade (hereinafter referred to as "the Russian Bank"); and a consent order was made for payment out to the bank of part of the proceeds of the sale of the cargo upon the terms, and in the

circumstances, which will be referred to later. A *caveat* against payment out without notice was afterwards entered on behalf of the shipowners in accordance with the Prize Court Rules. Later a writ was issued in the King's Bench Division by the Russian Bank against the shipowners, in which a declaration as to the rights of the parties was claimed; and a summons to stay that action was issued, which now stands adjourned.

The matter which now arises for decision is whether the claim of the shipowners, and the questions as to the rights of the shipowners and the cargo owners in respect of the proceeds, are to be determined in a common law Court in the King's Bench Division, or in the prize proceedings in this Division. I apprehend that the principles and practice governing this matter are the same since the assignment to this Division of the Prize Court jurisdiction of the High Court, under the Judicature Act, 1891, as in former times when the jurisdiction in prize was vested in and exercised by the High Court of Admiralty.

The subject is one of general importance affecting our judicature, and I propose, in the first place, to deal with it upon lines applicable to proceedings of this nature generally; and then to state the particular facts of this case to which the principles and practice governing such cases have to be applied.

Counsel for the shipowners, in their argument, cited many authorities for the proposition that this Court, exercising its prize jurisdiction, had the exclusive right to determine such questions as those in issue, and not a common law Court; and that such determination should be in accordance with the prize law. It has been my duty to examine those authorities and others throwing light upon the subject. Having done this, it does not appear to me to be necessary or useful to go through the cases in detail, because the examination of them shews that the results which are summarised in text-books of various authors—themselves authorities of acknowledged renown—are abundantly justified by the decided cases.

Mr. Justice Story, who, as an exponent in treatises and judgments of matters relating to prize law, is hardly second to Lord Stowell himself, in his *Notes on the Principles and Practice of Prize Courts*, writes as follows:

“When once the Prize Court has acquired jurisdiction over the principal cause, it will exert its authority over all the incidents. It will follow prize proceeds into the hands of agents or other

persons holding them for the captors, or by any other title. . . . It may also enforce its decrees against persons having the proceeds of prizes in their hands, notwithstanding no stipulation, or an insufficient stipulation, has been taken on a delivery on bail; for it may always proceed *in rem* where the *res* can be found, and is not confined to the remedy in the stipulation; and in these cases the Court may proceed upon its own authority *ex officio*, as well as upon the application of parties; nor is the Court *functus officio* after sentence pronounced, for it may proceed to enforce all rights, and issue process therefor, so long as anything remains to be done touching the subject-matter. The Prize Court has also . . . exclusive authority as to the allowance of freight, damages, expenses, and costs in all cases of captures, and though a mere maritime tort unconnected with capture *jure belli* may be cognisable by a Court of common law; yet it is clearly established that all captures *jure belli*, and all torts connected therewith, are exclusively cognisable in the Prize Court" (pp. 30-32).

And in a decision of the Supreme Court of the United States in which Mr. Justice Story delivered judgment he says, "For if the Admiralty has, as it is conceded on all sides it has, jurisdiction over the incidents, as well as the principal matter of prize, it must be just as much exclusive in the first case as in the last"—*MAISONNAIRE v. KEATING* [1815] (2 Gall. 325, at p. 343).

So Chancellor Kent, in his *Commentaries on American Law*, says, "It is a principle perfectly well settled, and constantly conceded, and applied, that Prize Courts have exclusive jurisdiction, and an enlarged discretion, as to the allowance of freight, damages, expenses, and costs, in all cases of captures, and as to all torts, and personal injuries, and ill-treatments, and abuse of power connected with captures *jure belli*" (12th ed. by Mr. Justice O. W. Holmes, vol. i. p. 359).

This passage was cited with approval in 1868 by the Supreme Court in *THE SIREN* [1868] (7 Wall. 152, at p. 161). One more passage may be cited, from Halleck's *International Law*: "Prize Courts also have exclusive jurisdiction, and an enlarged discretion as to allowance of freight, damages, expenses, and costs, and as to all torts, personal injuries, ill-treatments, and abuse of power, connected with maritime captures *de jure belli*. . . . This rule rests upon the ground that where the Prize Court has the sole and exclusive jurisdiction of the original matter, it ought also to have such jurisdiction of all its consequences, and of everything

necessarily incidental thereto. The Courts of common law in England have no jurisdiction at all of such incidental questions; and this doctrine has been reaffirmed by the Courts of the United States" (4th ed. by Judge Sir G. Sherston Baker, Bart., vol. ii. pp. 433-434).

In the leading case of *LE CAUX v. EDEN* (2 Dougl. 594), Mr. Justice Buller, in a judgment which deals exhaustively with the subject, says, "The principle is that the question prize or not prize, and the consequences of it, are conusable solely in the Admiralty Court; the true reason of which is that prizes are acquisitions *jure belli*, and the *jus belli* is to be determined by the law of nations and not by the particular municipal law of any country."

Lord Mansfield (who was a party to the decision in *LE CAUX v. EDEN* (2 Dougl. 594), in the history he gave of the Instance and Prize jurisdictions of the Court of Admiralty in *LINDO v. RODNEY* (2 Dougl. 614), said, "The whole system of litigation and jurisprudence in the Prize Court is peculiar to itself; it is no more like the Court of Admiralty than it is to any Court in Westminster Hall." And after describing some of the matters with which the Prize Court had to deal, he added: "These views cannot be answered in any Court of Westminster Hall, and therefore the Courts of Westminster Hall never have attempted to take cognisance of the question prize or no prize: not from the locality of being at sea, but from their incompetence to embrace the whole of the subject."

The decision in *LE CAUX v. EDEN* (2 Dougl. 594) was that an action for false imprisonment would not lie at common law where the imprisonment was in consequence of taking the ship as prize, although the ship had been acquitted and restored, and the captor had been condemned in costs and damages in the Prize Court.

More than thirty years afterwards came the case of *FAITH v. PEARSON* (4 Camp. 367), which carried the doctrine of the exclusive jurisdiction of the Prize Court still further; because in that case (which was an action at common law for trespass for seizing ship and cargo) the captor, who found he had made a mistake in capturing the ship, had given her up without having instituted any proceedings against her in the Court of Admiralty. In deciding that the common law Court had no jurisdiction, Chief Justice Gibbs said: "The moment it appears that the ship was seized as an enemy, there is an end of this action. Although the

defendant had no probable cause for what he did, he is only amenable in the Court of Admiralty. I well remember the case of *LE CAUX v. EDEN* being decided. The decision was approved of at the time, and has been adhered to ever since. The principle there laid down fully applies to the action we are now trying. If the ship is actually seized as prize, although she is released by the captor without being libelled in the Admiralty Court, the Courts of common law have no jurisdiction upon the subject. . . . We are incompetent here to consider whether the captor was excusable for what he did; and if he was not, what compensation he ought to make to the parties injured. I conceive that they are by no means without remedy, and that proceedings may be originated in the Admiralty Court on the part of the captured. There the question of prize or not prize will be properly discussed, the existence of probable cause will be proved or negatived, and by a single decree justice will be done to all concerned" (4 Camp. 357, at pp. 358 and 359).

The Prize Court has constantly dealt with claims for freight and damages where ships or cargoes have been captured or seized, not only as between captors and owners, but also as between owners of ships and owners of cargo, and have adjudicated upon such claims whether the ship or cargo has been released, and when both ship and cargo have been released; and apparently no action involving questions in similar cases were brought in any common law Court.

And this is obviously for grounds solid in justice and convenient in practice, because the two Courts administered two different codes or systems of law; the Prize Courts deal with claims in accordance with the Law of Nations, and upon equitable principles freed from contracts, which almost always cease to have effect upon capture or seizure, by reason of the non-appearance or non-completion of the contract of affreightment; whereas common law Courts would only determine the consequences of the strictly legal contractual obligations of the parties. The King's Bench Courts would either give the claimants for freight the whole or nothing, according to whether the contract of affreightment had been performed or not. But the Prize Court takes all the circumstances into consideration, and may award, as it has done in decided cases, the whole or a moiety of the freight, or a sum *pro rata itineris*; or it may discard the contract rate altogether, even as a basis for assessment on calculation—*vide* *THE TWILLING*

RIGET (5 C. Rob. 82); or it may withhold or diminish the sum by reason of misconduct—as, for example, resistance to search, or spoliation.

And we find that in accordance with the principles, precedents, and practice which have established the exclusive jurisdiction of the old High Court of Admiralty, to which the Admiralty Division of this Court has succeeded when sitting as a Prize Court, the Prize Court Rules have been framed for this Court, and have been made by the Privy Council under the Prize Court Act, 1894, and not by the Rule Committee which frames the Rules for the High Court. It is not necessary to refer further to these rules, but attention may be directed to Order XLV., which provides that in the absence of prescribed rules the practice of the late High Court of Admiralty in prize proceedings shall be followed, or such other practice as the President of this Division may direct. It may also be noted that the appeal from decisions of this Court on all questions, claims for freights included, is to the Judicial Committee of the Privy Council; whereas, if similar questions could be tried in the Commercial Court or any Court of the King's Bench Division, the appeal would be to the Court of Appeal or to the House of Lords.

This Court has also its special officers, like the Registrar and Merchants and the Admiralty Marshal, and its special machinery for dealing with all such matters as may arise in prize proceedings.

I have dealt with the important question of jurisdiction generally. But, in truth, counsel for the claimants did not dispute the main propositions which have been stated; but contended, as I understood, that where, as in this case, the captors or the Crown after seizure released the goods, not only had the King's Bench Courts jurisdiction to deal with the claim for freight, but that they alone had the jurisdiction to the exclusion of this Court, even when the proceeds of the cargo seized and sold are now in the hands of this Court. This contention is, in my view, quite unsound. A somewhat similar argument was put forward in *LE CAUX v. EDEN* (2 Dougl. 594) on the ground that the ship had been declared by the sentence of the Prize Court to be no prize; but it did not prevail. As I have before pointed out, the Prize Court exercised jurisdiction, and exclusive jurisdiction, where the subject-matter had been acquitted or released, and it had been held that such jurisdiction was vested in it, even when captures had

been abandoned without any proceedings having been instituted at all.

When the particular facts of the present case are looked at, it is as clear as light that this Court alone has jurisdiction to deal with the claim for freight, and that it would be most inconvenient if it were otherwise.

[The learned Judge stated the facts as set out above, and then proceeded:] The Société Générale, through their counsel, adopted the argument of counsel for the shipowner, and desire that the questions affecting them should be heard in this Court. Upon these facts I repeat that it is clear beyond dispute that the owners and cargo owners are within the exclusive jurisdiction of this Court.

I will only point out further that the Crown had full right to consent to the release of any ship or goods captured or seized, on any grounds that the Crown may see fit. Moreover, it does not by any means follow as a necessary consequence of the release that goods were not properly seized as prize as the Crown's droits of admiralty. In the present case, as the Empire of Russia is our ally in the war, it does not require a very vivid imagination to conceive grounds for giving up to the Russian Bank the proceeds of the portion of the cargo claimed by them, quite other than an acknowledgment of wrongful seizure. And if it be thought material, it would be quite open to any one interested in these proceedings at any stage to allege and to set out to prove that the seizure of the cargo was lawful.

I give directions, therefore, that the claim of the shipowners, and all questions between them and the Russian Bank and the Société Générale, be heard in these prize proceedings. I have spoken to the Judge of the Commercial Court, Mr. Justice Bailhache, and I do not anticipate that there will be any difficulty in disposing of the action in the King's Bench Division accordingly.

The Russian Bank for Foreign Trade must pay the costs of these interlocutory proceedings.

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*Solicitors*—King, Wigg & Brightman, agents for Wilkinson & Marshall, Newcastle, for Prince Line, Lim.; Coward & Hawksley, Sons & Chance, for Russian Bank for Foreign Trade; Loughborough, Gedge, Nisbet & Drew, for Société Générale de Paris; Treasury Solicitor, for Crown.

[Reported by E. C. Trehern, Esq., Barrister-at-Law.]

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## [ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). March 22, 29, 1915.

## THE ROLAND.

*Enemy Ship—Freight on Released Cargo—Presumption as to Cargo on Enemy Vessel—Burden of Proof—Further Proof.*

*A captor is not entitled to freight from the owners of cargo which has been brought before the Prize Court and released, unless the cargo has been carried to its port of destination according to the intent of the contracting parties.*

*According to prize law, goods on an enemy vessel consigned to an enemy port are prima facie enemy goods, and the onus is on claimants who allege that the goods belong to them, as neutrals, to satisfy the Court with clear evidence.*

Cause for condemnation of a part cargo of tobacco as prize.

In July, 1914, the German sailing ship *Roland*, 1,377 tons, sailed from New Orleans for German ports with a full cargo of tobacco and oak staves. On August 5 she was captured off the Scilly Isles by H.M.S. *Isis*, and brought into Plymouth. On December 1 she was condemned as prize. The Procurator-General now claimed the condemnation of the cargo.

Appearances were entered by Wessels, Kulenkampff & Co., of New York, Trinidad, and Jamaica, who claimed to be the neutral owners of three hundred and forty-two hogsheads of the tobacco; and by Rudolf Hach & Co. and Suhling & Co., of Tennessee and Virginia, as the neutral owners of fifty hogsheads.

The claimants alleged that the tobacco was consigned to Bremen to be sold there, and that the property remained in them as shippers.

*Maurice Hill, K.C., and D. Stephens, for the Crown.*

*Leck, K.C., and W. N. Raeburn, for Rudolf Hach & Co. and Suhling & Co.*

*C. R. Dunlop, for Wessels, Kulenkampff & Co.*

It was argued for the Crown that, in the absence of proof of the neutral character of goods found in an enemy vessel, the presumption was that they were enemy goods, and that the claimants Wessels, Kulenkampff & Co. had put forward



suspicious documents, and not discharged the onus upon them; and *THE MAGNUS* [1798] (1 C. Rob. 31), *THE JENNY* [1866] (5 Wall. 183), and *THE ROSALIE AND BETTY* [1800] (2 C. Rob. 343; 1 Eng. P.C. 246) were cited, and article 59 of the Declaration of London, 1909, and Story's *Notes on the Principles and Practice of Prize Courts* (Pratt's ed.), p. 55, referred to.

For the claimants Wessels, Kulenkampff & Co. it was argued that the presumption that goods on an enemy ship were *prima facie* enemy property only applied to goods shipped after war, and that the claimants had given sufficient proof of neutral ownership.

With regard to the claim of Rudolf Hach & Co. and Suhling & Co., the Crown admitted that they were entitled to the release of three-fourths of the portion of cargo claimed by them, and on this portion the Crown claimed to have a lien for freight and the right to have the freight paid before the cargo was released. In addition to the cases referred to in the judgment on this point, *THE PROSPER* [1809] (Edw. 56; 2 Eng. P.C. 25) and *PARADINE v. JANE* [1670] (82 E. R. 897) were cited.

SIR SAMUEL EVANS (THE PRESIDENT), after dealing with several parcels of the *Roland's* cargo, in respect of which no appearance had been entered, and which he accordingly condemned, said: With regard to the claim of Wessels, Kulenkampff & Co., they are a firm whose commercial domicil is American, and who carry on part of their business at Jamaica and Trinidad. One of the members, Louis Wessels, is a British subject, who resides at Kingston, Jamaica, and who apparently takes charge of the business transacted there. The other members of the firm reside in New York, and their business domicil, therefore, is American, but they are German subjects.

They claim these three hundred and forty-two hogsheads of tobacco as being their property, and as property, therefore, belonging to neutrals. The Crown seized the goods as being enemy property, to which they are entitled as prize.

I think it is abundantly clear, according to prize law, that property upon an enemy ship consigned to an enemy port is *prima facie* enemy property, and it is for the claimants, who allege that the property belongs to them, as neutrals, to make out their case, and to make it out clearly. No authority is required for that, though several authorities have been referred to in the course

of the arguments. I am content to say that that is, and ought to be, the presumption in cases of this description.

The question, therefore, to which I have to address myself is whether the evidence which has been put before the Court for the claimants Wessels, Kulenkampff & Co. is sufficient to establish that the property in the goods is in them. The goods were put on board this German vessel before the war. She sailed in the early days of July, was captured at sea on August 5, and was condemned on December 1 as being an enemy vessel. The first appearance of Wessels, Kulenkampff & Co. was entered on September 7. More than six months have elapsed, and abundant opportunity has been given to these gentlemen, who carry on business in New York, to put before the Court a complete case in order to try and establish their ownership in these goods. Several affidavits have been made on their behalf from time to time.

Putting it broadly, the case set up by the affidavits is that this property belonged to the firm whose commercial domicile is in New York, and that it was sent forward to some agents in Bremen, Gebrüder Kulenkampff, for the purpose of sale; that the property remained in the shippers and had not become transferred to these consignees or agents, or to anybody else in the enemy country. The bills of lading, according to copies put before me, shew that the tobacco was consigned to the order of the shippers. But the first affidavit of Gustav B. Kulenkampff describes Gebrüder Kulenkampff, of Bremen, as the consignees—whether by mistake I do not know. Nothing could have been simpler than for the claimants to bring forward the whole of the transactions relating to this shipment, and possibly other shipments of a similar kind, consigned to their agents for sale in Bremen. If the bills of lading were sent forward to Bremen, as they say they were, nothing would have been easier than for the business firm in New York to exhibit the correspondence between them and their agents in Bremen. In my opinion, the original letters, or copies of the letters, should have been produced. The claimants ought to have produced any letters from the firm in Bremen—sometimes described as agents and sometimes as consignees—acknowledging receipt of the bills of lading.

It is said that the bills of lading produced in Court are the original bills of lading. It is enough for me to say that I have very grave doubts about that matter. The bills of lading have

been sent forward. It was said that it was intended to indorse them, and that the fact that one was not indorsed was due to some omission. How were these documents procured after the outbreak of war? They must have been procured by post or in consequence of telegraphic communication with Germany. Everybody knows that, although it is very difficult to carry on postal communication between this country and Germany, it goes on, subject to delay, between Germany and the United States.

It must have been obvious to the claimants that the bills of lading would be required to be produced, and yet I have not seen a single letter. One of the documents produced is said to be an invoice. It is dated September 2, 1914, but there is no explanation whatsoever before the Court as to how that document came into existence, or what it purports to be, except through the mouth of counsel. As I understand the claimants' counsel, he puts it forward as a genuine document. If that be so, I fail entirely to see how that document could have come into existence at that time as a genuine document. It purports to be an "invoice of three hundred and forty-two hogsheads tobacco, shipped on board the German ship *Roland* from New Orleans for Bremen, Freihaven . . . for account and risk of whom it may concern, and consigned to order," and without some explanation is an unintelligible document as evidence of a commercial transaction.

The goods having been shipped by this firm in America on board a German vessel, consigned to Bremen—to consignees who are in business in Bremen—I have ample justification for deciding that they were enemy goods, in the absence of the clearest evidence to the contrary. So far from the evidence being clear, I think it leaves the matter still more doubtful. I have no hesitation, therefore, in holding that these goods are enemy goods, laden in an enemy ship, and consigned to enemy purchasers, and that the claimants have failed to establish their case that the property in the goods remained in them.

Counsel asked me to say that if the evidence before the Court was not deemed to be sufficient to establish the claim of the claimants, time should be given for further proof. I have already commented upon the fact that an appearance was entered on September 7. These proceedings have been long pending, and I see no attempt on the claimants' part to remedy any defects in the evidence. Therefore I cannot give further time, and the result is that these three hundred and forty-two hogsheads of tobacco,

shipped by Wessels, Kulenkampff & Co., are condemned as enemy property.

The last parcel in dispute consists of fifty hogsheads of tobacco, shipped by Richard Meyer & Co. as shipping agents for Rudolf Hach & Co. The question I have to determine first of all in this case is whether or not Rudolf Hach & Co., whose domicile is in America, and who, for the purposes of this case, are regarded as neutrals, are entitled to a three-fourths part of the hogsheads, or whether they are entitled to the whole. The firm of Rudolf Hach & Co. have been in the habit of buying, on what was clearly a joint adventure, certain tobacco from Kentucky, which they send to Bremen for the purpose of being sold there.

The people who were interested in the joint adventure were this firm, Rudolf Hach & Co. of Tennessee, Suhling & Co. of Virginia, and Christopher H. Suhling of Bremen. The business was carried on apparently in this way: Rudolf Hach & Co. purchased on the joint account of themselves and the two other houses that I have named and were responsible for two-fourths, and the other two firms for one-fourth each. The question I have to decide is whether C. H. Suhling of Bremen was interested in one-fourth part of this particular consignment. Counsel for the Crown were willing to admit that the other three-fourths belonged, as to two-fourths to Rudolf Hach & Co., and as to one-fourth to Suhling & Co. of Virginia.

[The learned Judge read the affidavits and some of the correspondence, and then proceeded:]

Looking at the whole of the transactions disclosed by the documents put before me, I find that the whole of this property, fifty hogsheads of tobacco, was bought by Rudolf Hach & Co. for the joint adventure, and that one-fourth belongs to C. H. Suhling of Bremen. The result, therefore, is that one-fourth part of the fifty hogsheads is enemy property, and I decree condemnation of it accordingly. It follows also that the other three-fourths, belonging to neutrals, must be released to them.

Now comes a further important question which will affect other cases as well—namely, as to whether the captors of the vessel are entitled as against the cargo which has been released—here three-fourths of the fifty hogsheads—to some freight.

The Crown claim to have a lien for the freight alleged to be payable in respect of the portion of the cargo released, and to have it paid before the release. The argument on behalf of the

Crown is that the shipowners are, by the German commercial law, entitled to some freight in respect of this released cargo, although it was not, and cannot be, delivered in Germany at the port of destination, and that as captors they are entitled to what the ship has earned as well as to the ship herself. This sounds quite logical, but the practice of Prize Courts (which has to deal with multifarious business affairs) shews that, although substantial justice is done, the results of what strict logic may appear to involve cannot always be attained. The old rule as to whether captors of an enemy vessel were also entitled to freight was quite clear.

Whenever a captor brought goods to the port of actual destination according to the intent of the contracting parties, he was held entitled to the freight, on the ground that the contract had been fulfilled, but in all other cases he was held not entitled to freight, although the ship might have performed a very large part of her intended voyage.

The rule was laid down in *THE FORTUNA* [1802] (4 C. Rob. 278; 1 Eng. P.C. 392) and *THE VROW ANNA CATHARINA* [1806] (6 C. Rob. 269; 1 Eng. P.C. 552), and some exceptions which emphasised the rule were dealt with in *THE DIANA* [1803] (5 C. Rob. 67; 1 Eng. P.C. 424) and *THE VROUW HENRIETTA* (reported in a note to *THE DIANA* at p. 75, and in 1 Eng. P.C., at p. 427).

I have been asked to abandon this rule where, according to the contract, it appears that some freight might be recoverable where only part of the intended voyage has been covered. So far as I know, the rule has never been departed from; and in a collection of cases published in America in 1906 it is still regarded as the rule of International Prize Law (see *Scott's Cases on International Law*, pp. 631 and 632).

Evidence was given before me as to the German commercial law, to the effect that some freight, depending on distances, times, expenses, risks, &c., is recoverable by the shipowner or person entitled to the freight in certain cases (captures as prize included) where the whole intended voyage has not been performed. I have looked at a translation of the sections of the code referred to, and it seems to me that many serious questions of law might be raised in an action to recover such freight. I was not informed, and I do not know, whether such an action has ever been brought in

Germany, in cases where ships have been captured—most probably, almost certainly, not.

The principle which gave birth to the rule referred to was not whether any and what sum could be recovered at law under the terms of the particular contract of affreightment. The rule was based on the broad business ground that the goods had not been carried to the place where the contracting parties intended them to be delivered, and disposed of.

It has been stated on oath in this case that there was no market in the United Kingdom for this particular kind of Kentucky tobacco—that the European market for it was Germany and Holland. That may or may not be the fact. If it be, the hardship upon the neutral owners of having to pay freight to the captor is obvious. It has been pointed out in the authorities that sometimes the advantage would be on the side of the cargo and sometimes on the side of the vessel. But “the possible advantage or disadvantage of an interruption of the original intended voyage is but an accidental circumstance to which the Court will but slightly attend. It would introduce a labyrinth of minute considerations, through which the Court could not find its way.” It would also necessitate, in cases like the present, a close investigation of all the terms, conditions, and circumstances involved in the contractual obligations of the parties, and of their rights and liabilities under foreign municipal law, which this Court has always refused to undertake.

The old rule, as stated above, must, in my opinion, still be adhered to as part of the Law of Nations. This parcel of the cargo—namely, three-fourths of the fifty hogsheads—will therefore be released to the neutral owners without carrying the burden of any freight.

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*Solicitors*—Treasury Solicitor; Hewitt, Urquhart & Wollacott; Hill, Dickinson & Co.

[*Reported by E. C. Trehern, Esq., Barrister-at-Law.*]

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[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). March 15, 22, 1915.

## THE PANARIELLOS.

*Trading with the Enemy—Commercial Intercourse between Subjects of an Allied and an Enemy State—Obligations of Allied Subjects—Bona Fides—Ally's Cargo Condemned.*

In May, 1914, a French company contracted to sell to a German firm at Frankfurt a quantity of silver lead f.o.b. Ergasteria, in Greece. In pursuance of the contract the French company chartered a steamer for a voyage to Antwerp and Newcastle to carry the lead to the purchasers from the German firm. Before the loading, which began on July 29, was finished, war broke out between Great Britain and her allies and Germany. On August 11 the vessel sailed. The French company then entered into negotiations with the London office of the German firm as regards the delivery of the lead, but on August 23 that office was closed by order of the Home Secretary, the negotiations fell through, and the French company diverted the vessel to Swansea, where the cargo, the property in which admittedly remained in the French company, was seized as prize:—Held, that the facts shewed that after war broke out the French company, although acting in good faith, had had commercial intercourse with the German firm which amounted to a trading with the enemy; and the subjects of an allied State being under the same obligations to Great Britain as regards intercourse with the enemy as British subjects, that the silver lead must be condemned.

Suit for condemnation of cargo as prize.

On May 9, 1914, the Compagnie Française des Mines de Laurium (hereinafter called the Laurium Co.), a firm of French merchants, contracted to sell to Beer, Sondheimer & Co., a German firm carrying on business at Frankfurt, 1,020 tons of silver lead f.o.b. Ergasteria, in Greece.

In pursuance of this contract the Laurium Co. chartered the Greek steamship *Panariellos* for a voyage from Ergasteria to Antwerp and Newcastle to carry the lead and other ores to

the German company's purchasers. Loading began on July 29, and was finished on August 10, and on August 11—a week after a state of war existed between Great Britain and her allies and Germany—the *Panariellos* sailed. Negotiations, which are fully set out in the judgment, were then entered into between the Laurium Co. and the London house of Beer, Sondheimer & Co. for the disposal of the cargo, but the London office was closed by order of the Home Secretary on August 23, and the negotiations fell through. When the *Panariellos* arrived in the Downs on August 28 her master refused to go on to Antwerp, where a portion of the cargo, consisting of zinc ore, was deliverable. Accordingly the ore was discharged at Southsea, and the Laurium Co. then sent the vessel round to Swansea, where they arranged to take delivery of the silver lead under the bills of lading which had been made out to them or their order. On the arrival of the *Panariellos* at Swansea on September 7 the cargo was formally detained pending enquiries, and on September 25 was seized as prize. Meanwhile the Laurium Co. had contracted to sell the silver lead to a London firm, who re-sold it to a firm of merchants at Newcastle. This firm, by arrangement between the Admiralty Marshal and the Laurium Co., were allowed to complete the purchase, and the proceeds of the sale—15,507*l.*—were paid into Court. An appearance was entered on behalf of the London house of Beer, Sondheimer & Co., but this was withdrawn, and it was admitted that the property in the silver lead remained in the Laurium Co.

*March 15.—The Solicitor-General (Sir Stanley Buckmaster, K.C.) and G. W. Ricketts, for the Crown.—*The Laurium Co. had complete control over ship and cargo. They allowed the ship to sail after war broke out in pursuance of a contract with enemy subjects, and they attempted to carry out the contract by entering into negotiations with the London agents of the enemy firm. This constituted a trading with the enemy, and the goods or their proceeds should be condemned—*THE HOOP* [1799] (1 C. Rob. 196; 1 Eng. P.C. 104) and *THE NEPTUNUS* [1807] (6 C. Rob. 403; 1 Eng. P.C. 593).

*Aspinall, K.C., and R. A. Wright, for the Laurium Co.—*No offence has been committed. The Laurium Co. were entitled to carry on business with the London house of Beer, Sondheimer & Co. as long as the Home Office allowed that agency to remain



open. Afterwards the Laurium Co. diverted the ship to Swansea. The lead was the property of an ally, on a neutral ship, and consigned to a British port, and the Laurium Co. never parted with it in pursuance of their contract with Beer, Sondheimer & Co.

[SIR SAMUEL EVANS (THE PRESIDENT).—The question may be whether, if the trading had come to an end, the property is confiscable. Was there a trading with the enemy at the time the goods were seized?]

Clearly not. All negotiations with the London house of Beer, Sondheimer & Co. had ceased, and the Laurium Co. had sent the *Panariellos* to Swansea in order not to perform the contract with Beer, Sondheimer & Co. There must be an actual trading with the enemy—THE ABBY [1804] (5 C. Rob. 251; 1 Eng. P.C. 464). The Laurium Co. have acted in good faith throughout the whole of the negotiations. There has been no attempt to dissemble, and the claim should be favourably regarded by the Court—see THE JUFFROW CATHERINA [1804] (5 C. Rob. 141).

*The Solicitor-General* (Sir Stanley Buckmaster, K.C.), in reply.—If there has been a trading with the enemy at the inception of the voyage, it is submitted that would be sufficient to condemn the goods, but the facts shew that the trading continued until the property was actually detained by the authorities. The claimants tried to carry out their contract with Beer, Sondheimer & Co. up to the time that the London house was closed, and did nothing at any time to shew that they were repudiating the contract.

*Cur. adv. vult.*

*March 22.*—SIR SAMUEL EVANS (THE PRESIDENT).—In these proceedings the Procurator-General on behalf of the Crown asks for the condemnation as prize of a cargo of 1,020 tons of silver lead, which was shipped by allied citizens in a neutral vessel, the Greek steamship *Panariellos*. The shippers, and the owners of the cargo at all material times, were a French company—La Compagnie Française des Mines de Laurium. The cargo was laden upon the vessel at Ergasteria, in Greece. It was originally shipped, and intended to be delivered, pursuant to a contract of sale, to a German company—Beer, Sondheimer & Co., of Frankfurt.

The case raises for the first time during the present war the important question of the liability to capture and confiscation of property of citizens of an ally, who are alleged to have had commercial intercourse with, or to have been trading with, the enemy. Therefore, before I deal with the facts, as the question affects this country and its allies and their respective subjects or citizens in the present complicated hostilities, it seems desirable in the public interest to state the general principles which are applicable to such cases according to the Law of Nations.

The following general propositions can, I think, be established: First, when war breaks out between States, all commercial intercourse between citizens of the belligerents *ipso facto* becomes illegal, except in so far as it may be expressly allowed or licensed by the head of the State. Where the intercourse is of a commercial nature it is usually denominated "trading with the enemy." This proposition is true also, I think, in all essentials with regard to intercourse which cannot fitly be described as commercial.

Secondly, on the outbreak of war, in which a belligerent has allies, the citizens of all the allied States are under the same obligations to each allied State as its own subjects would be to a single belligerent State, with relation to intercourse with the enemy.

Thirdly, where such illegal intercourse is proved between allied citizens and the enemy, their property engaged in such intercourse, whether ship or cargo, is subject to capture by any allied belligerent, and is subject to condemnation in that belligerent's own Prize Courts.

Fourthly, when such intercourse in fact takes place, the property of the persons engaged in it is confiscable, whether they were acting honestly and with *bona fides* or not.

The rule embodied in the proposition first mentioned was authoritatively stated by Lord Stowell in *THE HOOP* (1 C. Rob. 196, at p. 200; 1 Eng. P.C. 104, at pp. 105-106), as follows: "In my opinion there exists a general rule in the maritime jurisprudence of this country by which all subjects trading with the public enemy, unless with the permission of the Sovereign, is interdicted. It is not a principle peculiar to the maritime law of this country; it is laid down by Bynkershoek as a universal principle of law—*Ex naturâ belli commercia inter hostes cessare non est dubitandum. Quamvis nulla specialis sit commerciorum*

*prohibitio, ipso tamen jure belli commercia esse vetita, ipsæ indictiones bellorum satis declarant, &c. . . .* In my opinion no principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the State. Who can be insensible to the consequences that might follow if every person in time of war had a right to carry on a commercial intercourse with the enemy, and, under colour of that, had the means of carrying on any other species of intercourse he might think fit?"

And, after an exhaustive review of numerous authorities, he added: "The cases which I have produced prove that the rule has been rigidly enforced; . . . that it has been enforced where strong claim not merely of convenience, but almost of necessity, excused it on behalf of the individual; that it has been enforced where cargoes have been laden before the war, but where the parties have not used all possible diligence to countermand the voyage after the first notice of hostilities; and that it has been enforced not only against the subjects of the Crown, but likewise against those of its allies in the war, upon the supposition that the rule was founded on a strong and universal principle, which allied States in war had a right to notice and apply mutually to each other's subjects" (1 C. Rob., at p. 216; 1 Eng. P.C., at p. 116).

And Mr. Justice Story, in his well-known *Notes on Prize Courts*, writes: "It is a fundamental principle of Prize law, that all trade with the enemy is prohibited to all persons whether natives, naturalised citizens, or foreigners domiciled in the country during the time of their residence, under the penalty of confiscation. The same penalty is applied to subjects of allies in the war, trading with the common enemy" (Pratt's edition, 69).

These statements of the law affecting commercial intercourse and trading with the enemy are a century old. In the meantime commerce, especially international commerce, has advanced and expanded, and occasionally in times of war there have since been special permission and licences given in relaxation of the rule. But the general rule, in the absence of any such licence, has been adhered to as the years have rolled on and commercial enterprises have developed. It may be well to fortify this by one or two more recent authorities, and reference may be made for this purpose to Dana's edition of Wheaton's *International Law* (8th ed. 1866), paragraphs 309-315; and to the fourth

edition of M. Calvo's most valuable and careful work, *Le Droit International*, which he published in 1888, about five years before his death, vol. iv. §§ 1953-1955. There is no doubt that the rule exists in all its force and rigour at the present day. In the view I take of the facts of the present case, as will be hereafter stated, there was a commercial intercourse between the claimants and the enemy which amounted to a "trading with the enemy."

But lest the higher and final tribunal might think otherwise, and adopt the argument for the claimants that there was no actual "trading with" the enemy, I will deal further with the more general and fundamental conception of the illegality of intercourse with the enemy apart from the element of commerce, and falling short of the act of trading.

In *THE COSMOPOLITE* [1801] (4 C. Rob. 8; 1 Eng. P.C. 326) Lord Stowell states the rule in quite general terms thus: "It is perfectly well known that by war *all communication* between the subjects of the belligerent countries must be suspended, and *no intercourse* can legally be carried on between the subjects of the hostile States but by the special licence of their respective Governments"; and in Christopher Robinson's note to this case (at pages 10 and 11) is cited a passage from the *Black Book of the Admiralty* (the original of which is the most precious possession entrusted to the President for the time being of this Division) as follows: "In the ancient practice of the Court of Admiralty (says the editor) we find it laid down: 'Item, soit enquis de tous ceux qui *entrecommunent*, vendent, ou achatent, avec aucuns des ennemis de Monsieur le Roi sans licence especiale du Roi, ou de son admiral.—*Black Book*, page 76.'"

No doubt it was with cases of commercial intercourse that Lord Stowell was dealing in *THE HOOP* (1 C. Rob. 196; 1 Eng. P.C. 104) and *THE COSMOPOLITE* (4 C. Rob. 8; 1 Eng. P.C. 326), but it will be remembered that in the former he enforced the reason for the rule by reference to the possible consequences of allowing persons to carry on a commercial intercourse, and under colour of that to give them the means of carrying on any other intercourse they might think fit—see 1 C. Rob., at p. 200.

In the United States of America the Supreme Court has given a very wide range to the "intercourse" which is prohibited by the rule we are dealing with.

In *THE RAPID* [1814] (8 Cranch, 155) Mr. Justice Johnson, in delivering the judgment of the Supreme Court (of which, be it

noted, Chief Justice Marshall and Mr. Justice Story were two of the members), pronounced upon this subject (page 161) as follows: "The universal sense of nations has acknowledged the demoralising effects that would result from the admission of individual intercourse. The whole nation are embarked in one common bottom, and must be reconciled to submit to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy—because the enemy of his country. It is not necessary to quote the authorities on this subject; they are numerous, explicit, and respectable."

And after dealing thus generally with the subject, he proceeded to consider the point urged for the claimant in that case, that there was no trading in the eye of the prize law such as would subject the property to capture, because the claimant had only sent a vessel to fetch away his own property, acquired before the war, from a small island belonging to the enemy, where they had been deposited before the war.

He answered this point thus: "The force of the argument on this point depends upon the terms made use of. If by "trading," in prize law, was meant that signification of the term which consists in negotiation or contract, this case would certainly not come under the penalties of the rule. But the object, policy, and spirit of the rule is to cut off all communication or actual locomotive intercourse between individuals of the belligerent States. Negotiation or contract has therefore no necessary connection with the offence. *Intercourse*, inconsistent with actual *hostility*, is the offence against which the operation of the rule is directed; and by substituting this definition for that of *trading with an enemy* an answer is given to this argument" (*Ibid.* pp. 162, 163).

On the same day as this judgment was pronounced (March 7, 1814), Mr. Justice Story delivered the judgment of the Supreme Court in another case, *THE JULIA* [1814] (8 Cranch, 181); and he expressly adopted the decision and the reasons and principles of the Judge of the Circuit Court, which (among others) appear from the following passage: "At the threshold of this inquiry, I lay it down as a fundamental proposition that, strictly speaking, in war all intercourse between the subjects and citizens of the belligerent countries is illegal, unless sanctioned by the authority of the Government, or in the exercise of the rights of humanity. I am aware that the proposition is usually laid down in more

restricted terms by elementary writers, and is confined to commercial intercourse" (*Ibid.* p. 193).

Then he quotes the principle of law laid down by Bynkershoek, which I have already read from Lord Stowell's judgment in *THE HOOP* (1 C. Rob. 196; 1 Eng. P.C. 104), and proceeds: "And yet it seems not difficult to perceive that his reasoning extends to every species of intercourse. Valin, in his commentary on the French ordinance, speaking of the reason of requiring the name and domicil in a policy, says: '*Est encore de connaitre, en temps de guerre, si malgré l'interdiction de commerce, qu'emporte toujours toute declaration de guerre, les sujets du Roi ne font point commerce avec les ennemis de l'Etat, ou avec amis ou alliés, par l'interposition desquels on ferait passer aux ennemis des munitions de guerre et de bouche, ou d'autres effets prohibés; car tout cela, étant défendu comme prédictible à l'Etat, serait sujet à confiscation et à être déclaré de bonne prise.*' In another place, adverting to a case of neutral, allied, and French property on board an enemy ship, &c., he declares it subject to confiscation because '*C'est favoriser le commerce de l'ennemi et faciliter le transport de ses denrées et marchandises, ce qui ne peut convenir aux traités d'alliance ou de neutralité, encore moins aux sujets du Roi auxquels toute communication avec l'ennemi est étroitement défendu sur peine même de la vie.*' From this last expression it seems clear that Valin did not understand the interdiction as limited to mere commercial intercourse."

The judgment of Lord Stowell in *THE HOOP* (1 C. Rob. 196; 1 Eng. P.C. 104) is then referred to, and the passage proceeds: "But independent of all authority it would seem a necessary result of a state of war to suspend all negotiations and intercourse between the subjects of the belligerent nations.

"By the war every subject is placed in hostility to the adverse party. He is bound by every effort of his own to assist his own Government, and to counteract measures of its enemy. Every aid, therefore, by person, communication or by other intercourse, which shall take off the pressure of the war, or foster the resources, or increase the comforts of the public enemy is strictly inhibited.

"No contract is considered as valid between enemies, at least so far as to give them a remedy in the Courts of either Govern-

ment; and they have, in the language of the civil law, no ability to sustain a *persona standi in judicio*. The ground upon which a trading with the enemy is prohibited is not the criminal intentions of the parties engaged in it, or the direct and immediate injury to the State. The principle is extracted from a more enlarged policy which looks to the general interests of the nations, which may be sacrificed under the temptation of unlimited intercourse, or sold by the cupidity of corrupted avarice. . . . Nor is there any difference between a direct intercourse between the enemy countries and the intercourse through the medium of a neutral port. The latter is as strictly prohibited as the former—THE JONGE PIETER [1801] (4 C. Rob. 79).

“It is argued that the cases of trading with the enemy are not applicable because there is no evidence of actual commerce; and an irresistible presumption arises from the nature of the voyage to a neutral port that no such trade is intended. If I am right in the position that all intercourse which humanity or necessity does not require is prohibited, it will not be very material to decide whether there be a technical commerce or not” (8 Cranch, at pp. 193-195).

In various cases intercourse which could not be properly described as commercial, or which could not answer the description of “trading,” has been declared illegal; and it would not be difficult to enumerate instances of such intercourse, in cases of absolute gifts of property to enemy subjects, of a comforting, useful, or beneficial character.

It remains to note a rule of a correlative nature, that whatever intercourse, commercial, trading, or otherwise, is prohibited, the same obligations are laid upon the citizens of an ally as upon the subjects of a single belligerent State, and the same penalties of confiscation fall upon allied citizens as upon such subjects on non-observance of the obligations.

Statements to this effect are found in the *dictum* from the judgment in THE HOOP (1 C. Rob. 196; 1 Eng. P.C. 104), and in the passage from Pratt’s *Story*, which have already been cited. But in THE NEPTUNUS (6 C. Rob., at p. 406; 1 Eng. P.C. 595, at p. 596) the doctrines as to the position of allies were material to the decision. Lord Stowell declares them in the following part of his judgment: “. . . if one State only is at war, no injury is committed to any other State [by allowing

particular relaxations]. It is of no importance to other nations how much a single belligerent chooses to weaken and dilute his own rights. But it is otherwise when allied nations are pursuing a common cause against a common enemy. Between them it must be taken as an implied, if not an express, contract that one State shall not do anything to defeat the general object. If one State admits its subjects to carry on an interrupted trade with the enemy the consequence may be that it will supply that aid and comfort to the enemy. . . . It should seem that it is not enough, therefore, to say that the one State has allowed this practice to its own subjects; it should appear to be at least desirable that it could be shown that either the practice is of such a nature as can in no manner interfere with the common operations, or that it has the allowance of the confederate State."

Again, this rule is stated in its full force sixty years later in *Wheaton*—see *Wheaton's International Law* (8th ed.), by Dana, 1866, par. 316: "Not only is such intercourse with the enemy, on the part of the subjects of the belligerent State, prohibited and punished with confiscation in the Prize Courts of their own country, but, during a conjoint war, no subject of an ally can trade with the common enemy without being liable to the forfeiture, in the Prize Courts of the ally, of his property engaged in such trade. This rule is a corollary of the other, and is founded upon the principle that such trade is forbidden to the subjects of the co-belligerent by the municipal law of his own country, by the universal law of nations, and by the express or implied terms of the treaty of alliance subsisting between the allied Powers. And, as the former rule can be relaxed only by the permission of the sovereign power of the State, so this can be relaxed only by the permission of the allied nations, according to their mutual agreement. A declaration of hostilities naturally carries with it an interdiction of all commercial intercourse. Where one State only is at war, this interdiction may be relaxed, as to its own subjects, without injuring any other State; but when allied nations are pursuing a common cause against a common enemy, there is an implied, if not an express, contract that neither of the co-belligerent States shall do anything to defeat the common object. If one State allows its subjects to carry on an uninterrupted trade with the enemy the consequence will be that it will supply aid and comfort to the enemy, which may be injurious to the common cause. It should seem that it is not



enough, therefore, to satisfy the Prize Court of one of the allied States, to say that the other has allowed this practice to its own subjects; it should also be shown, either that the practice is of such a nature as cannot interfere with the common operations, or that it has the allowance of the other confederate State."

And still more recently, M. Calvo, in the edition of *Le Droit International*, already referred to (vol. iv. par. 1956), states the rule and the reasons for it:

" § 1956. *La même règle s'étend aux sujets alliés.* Heffter, il est vrai, n'est pas de cet avis: il trouve la question plus délicate pour les alliés que pour les nationaux, parce qu'à l'égard des premiers, le belligérant semble en quelque sorte assumer une autorité juridictionnelle qui ne lui appartient que quand elle découle pour lui de stipulations conventionnelles expresses. Mais c'est là, suivant nous, une thèse irrationnelle, puisque l'alliance devant avoir pour conséquence logique de placer les co-belligérants exactement sur la même ligne à l'égard de l'ennemi, il n'est pas admissible que la prohibition imposée à l'un ne s'étend pas de plein droit à l'autre. C'est au surplus ce que Wheaton démontre d'une manière irréfutable, quand il dit que pour être justes et sensées, la règle et les exceptions qui y sont apportées doivent s'appliquer également à tous les deux; qu'en défendant la continuation du commerce avec l'ennemi, le belligérant obéit à la fois aux préceptes du droit civil interne, aux principes généraux du droit des gens et à l'esprit ou à la lettre de l'alliance qu'il a contractée.

" Il fait enfin remarquer que la situation de l'allié par rapport à l'ennemi commun étant la même que celle de son co-belligérant, on ne saurait en ce qui concerne le commerce, établir de distinction entre ceux qui entreprennent une lutte de concert et se sont par là tacitement obligés à ne rien faire de contraire au but général de l'alliance qui les unit.

" Dans une de ses sentences, Sir W. Scott déduit de ce principe qu'il ne suffisait pas pour sa justification que l'Etat allié put alléguer qu'il avait autorisé la continuation du trafic avec son adversaire, mais qu'il fallait encore que son co-belligérant eût donné son assentiment à la mesure."

So intimate and imperative are the neutral duties of allies bound to each other by sacred and solemn bonds to fight a common foe that I believe the true rule to be that whatever intercourse with an enemy is prohibited by International Law, no

relaxation whatever can be allowed by one State in favour of its citizens, which can affect the confederate State, unless expressly sanctioned by the latter.

Finally, it is clear that the rule must be enforced and confiscation decreed whether a person engaging in the prohibited intercourse acts innocently, in good faith, and in pursuance of advice honestly believed to be sound, or of licences or permissions honestly believed to be valid. The authorities for this are numerous. *THE HOOP* (1 C. Rob. 196; 1 Eng. P.C. 104) in itself would be sufficient. The fact of actual intercourse is the determining factor. Innocence of intention is no answer. If there has been an infraction of the rule, however innocent, the Court must apply the consequences of decreeing confiscation. To borrow the quaint language of a Judge of the United States Supreme Court: "It is the unenvied province of this Court to be directed by the head, and not by the heart. In deciding on principles that must define the rights and duties of the citizen [and it may be added of allied citizens], and direct the future decisions of justice, no latitude is left for the exercise of feeling."

Having stated the principles, it now remains to set out the material facts in the present case to which the principles have to be applied.

The claimants—the French company—had had constant dealings with Beer, Sondheimer, the German company. The German company sold to the French company silver and lead ores; and the French company then carried out in Greece a process of reduction which resulted in a product called silver lead, which they contracted to sell to the German company.

The contract was before the war. For the purpose of fulfilling the contract, after the silver lead was manufactured, the French company chartered the Greek steamship *Panariellos* to carry the lead to the purchasers. The loading of the silver lead upon the steamship began before the war. It was continued for about seven days after the war.

The vessel began her voyage on August 11 with the cargo on board, which was intended to be delivered pursuant to the contract with the German company.

While the loading was proceeding, the following letter was sent, on August 4, 1914, by the agents of the French company at Ergasteria to the French company's head office in Paris: "Having received from Francfort the following telegram: 'Send

Bill of Lading Ship *Panariellos* 1000 tons Silver lead direct Beer Sondheimer et Co. London 120 Fenchurch Street and transmit by your Paris Office by Telegram these instructions. Telegraphic communications with Paris stopped. Acknowledge receipt.—BEERSONDHEIMER.'—We wired you this morning: 'Telegraphic communication between Frankfurt and Paris stopped; Beersondheimer beg us to ask you send Bills of Lading for. 1000 lead *Panariellos* direct 120 Fenchurch London.' "

Beer, Sondheimer, of 120 Fenchurch Street, London, was a mere agency for Beer, Sondheimer & Co., of Frankfurt. The work at the agency was carried on by a German subject, who was in Germany at the outbreak of the war, with the aid of a clerk who was an Austrian subject.

[His Lordship read further letters and telegrams between the parties, from which it appeared that the London agency of Beer, Sondheimer & Co. were asking for the bills of lading, which the Laurium Co. promised to send as soon as they received them, according to the instructions received from Beer, Sondheimer & Co. in Frankfurt. The judgment continued as follows:]

On August 22 Baron de Catelin, the managing director of the French company, had an interview in London with Mr. Weissberger, the Austrian subject, who was then in charge of the London agency of the German company. In a statement subsequently sent to the Procurator-General by the Baron, he said that at this interview it had been verbally agreed that if the lot of lead was delivered to the said firm a complete settlement of accounts would follow. The Baron seems to have thought that up to that time the London agency of Beer, Sondheimer & Co. had a right to continue to carry on their business on behalf of the German company.

On the following day, August 23, the offices of Beer, Sondheimer, in London, were seized and closed. On August 25, a letter was sent from the Paris office of the claimants to the London agency of Beer, Sondheimer & Co., apparently without any knowledge of the interview of August 22, or of the closing of the agency office. The Baron said it was written without any authority from him or the company; but in these proceedings I have no means of testing that statement, and must assume it was written in the ordinary course of business, especially as no steps

were taken to put an end to any further communications. The following is a translation of the letter :

" Gentlemen,

" *Panariellos*. Confirming our letter St. No. 5863 of the 21st of this month, we beg to send you annexed :—

" 1. A bill of lading endorsed in blank 10,476 pigs or 510 tons of silver lead, loaded in holds 1 and 3.

" 2. A bill of lading endorsed in blank 10,493 pigs or 510 tons silver lead, loaded in holds 2 and 4.

" We beg you please to acknowledge the receipt of these documents, and we remain, gentlemen,

" (Signed) P. ALBRAND."

The vessel arrived in the Downs about August 28, and the master refused to proceed to Antwerp, where part of the cargo—namely, some zinc ore—was to have been delivered, part of it being destined for Germany or German firms. The vessel was afterwards sent to Southsea, where there was a market for the zinc ore. The zinc ore, which was stowed above the silver lead, was sold. The vessel arrived at Swansea on September 7, 1914, and on that day the silver lead was formally seized pending further enquiries, and was finally seized as prize subject to confiscation on September 25, 1914.

Meantime, on August 31, a letter was written by the claimants to their London brokers, in which the following passages appear :

" Enclosed I send one bill of lading of the *Panariellos* endorsed in blank so you have every right to take delivery of the cargo. . . .

" So far as concerns the lead you decide with Dixon and Heberlein the best course to adopt with regard to this lot.

" If Beer, Sondheimer or the English Government wish to use the parcel bill of lading which they have in their hands, you should explain that this bill of lading was sent them in current account, but that in reality almost the whole, say four-fifths, belong to us. In fact, I have no time to give you details of this current account, but the balance in favour of Beer, Sondheimer, without reckoning the *Panariellos*, comes to 103,648*l.* 35*s.* As the value of the 1,000 tons of lead in the *Panariellos* is about 500,000*l.*, the difference should come to us, say, in round figures, 400,000*l.*, and the Government should only be able to seize the balance. . . . The money coming over from the cala-

mine or from the lead should be paid to the account of our company at the London County and Westminster Bank, Ltd.

"Relying on your efforts and thanking you in advance for all that you will do for us.

"(Signed) J. DE CATELIN."

The Baron de Catelin disavowed with emphasis any intention in these transactions to do anything which would be helpful to the enemy or prejudicial to this country. I accepted willingly his disavowal. He probably thought that he could properly deliver the cargo of silver lead to his customers, Beer, Sondheimer & Co., if they accepted delivery at Newcastle or elsewhere in England.

After these proceedings were instituted, Beer, Sondheimer & Co., London agency, caused an appearance to be entered, and put in a claim as the owners of the goods. This claim was subsequently abandoned by an express notice of withdrawal.

The cargo was sold by arrangement between the Marshal and the claimants, and the proceeds, amounting to about 16,000*l.*, are now in Court.

The above facts are amply sufficient to shew that, in respect of the cargo of 1,020 tons of silver lead, there was commercial intercourse and a trading after the war between the present claimants and citizens of the enemy.

Applying the principles deduced to the facts proved, I have no alternative but to declare that the cargo was confiscable, and to decree the condemnation of the proceeds as lawful prize.

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*Solicitors*—Treasury Solicitor; Rehder & Higgs.

[*Reported by E. C. Trehern, Esq., Barrister-at-Law.*

[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT).

May 3, 4, 5, 6, 21, 1915.

## THE OPHELIA.

*Enemy Hospital Ship—Seizure as Prize—Suspicious Movements—Signalling Lights—Destruction of Ship's Papers—Hague Conference, 1907, Convention X.*

An enemy vessel, certified by the German Government as an auxiliary hospital ship, and adapted (although inadequately) as such, was encountered off the Dutch coast, near the Haaks lightship, by British warships. She was taken into port to be searched, and was afterwards seized as prize. She had on board 1,220 Verey's lights, and rockets and flares suitable for signalling, of which no satisfactory account was given by her. When about to be boarded by an officer from one of the warships, a number of books and documents were thrown overboard, and subsequently others were burnt; and she had shortly before sent a wireless message in code to the German signalling station at Norddeich. She had made two unexplained voyages from the mouth of the Elbe to Heligoland. On the only occasion on which she went out to render assistance after a German naval disaster forty-eight hours elapsed before she arrived on the scene, the distance to be covered being sixty miles; and during the ten weeks that the war had lasted no sick, wounded, or shipwrecked person had been received on board. There was evidence that she had increased speed to evade search by a British submarine. According to her log, her full speed was at least two knots more than was sworn to by her witnesses, and there were other matters not satisfactorily explained:—Held, that the vessel was not adapted and used for the sole purpose of affording aid to the wounded, sick, and shipwrecked; that she was adapted and used as a signalling ship for military purposes; that therefore she had forfeited the protection afforded to hospital ships by Convention X. of the Hague Conference, 1907; and that she must be condemned as lawful prize.

The serious view taken by Prize Courts of the destruction of ship's papers, and the doctrines laid down with reference thereto,

*are specially applicable to vessels claiming to be hospital ships, whose papers should be perfectly innocent; and if the ship's papers are not preserved, the inference is strong that if produced they would afford evidence of guilty practices.*

Suit for condemnation of an enemy hospital ship as prize.

On October 18, 1914, the *Ophelia*, a German auxiliary hospital ship, 1,153 tons gross, was stopped off the coast of Holland, in the neighbourhood of the Haaks lightship, by a squadron of British warships; and in the circumstances mentioned in the judgment, after being boarded and her commander questioned, she was taken into Yarmouth and thence to the Thames, where she was formally seized as prize. \*

Her release was claimed on behalf of the Imperial German Government on the ground that she was a military hospital ship, of which due notice to the belligerent Powers had been given, and therefore was exempt from capture under Convention X. of the Hague Conference, 1907.

The contention for the British Government was that the vessel had forfeited her right to the protection afforded by the Hague Convention, as she was being used as a signalling ship for military purposes.

The facts are fully stated in the considered judgment of the President.

*The Attorney-General (Sir John Simon, K.C.), The Solicitor-General (Sir Stanley Buckmaster, K.C.), and C. R. Dunlop* appeared for the Crown.

*Leslie Scott, K.C., Leck, K.C., and W. Norman Raeburn* represented Staff-Surgeon J. V. C. Pfeiffer, commander of the *Ophelia*, the claimant on behalf of the Imperial German Government.

May 21, 1915.—SIR SAMUEL EVANS (THE PRESIDENT).—This steamship was captured by some of His Majesty's ships of war on October 18 last. A claim for her release is made on behalf of the Government of the German Empire, on the ground that she was a military hospital ship belonging to that Government. I note, without further comment, that the claim is founded upon the provisions of Convention X. of the Hague Convention of 1907. The Crown formulated their case for the captors and against the claimants, in accordance with the terms of the same Convention.

I will deal with the case upon the same basis, avoiding all enquiry as to whether the Government of the German Empire is, or is not, precluded by its conduct of the present war from invoking the aid or protection of the tenth or any other of the Hague Conventions.

The provisions of the Hague Convention relate to three classes of hospital ships: First, military hospital ships of a belligerent Power; secondly, hospital ships equipped wholly or in part at the expense of private individuals or officially recognised relief societies of a belligerent Power; and thirdly, hospital ships so equipped at the expense of such individuals or societies of neutral countries.

We are here concerned only with the provisions relating to the first of these classes—namely, military hospital ships of a belligerent.

Before stating the facts, it is convenient to summarise these material provisions.

A military hospital ship must be constructed or adapted specially and solely for the purpose of affording relief to the wounded, sick, and shipwrecked. She is to afford relief and help to the wounded, sick, and shipwrecked of the belligerents without distinction of nationality. She must not be used for any military purpose. She is subject to the right of control and of search by the belligerents. Belligerents may refuse to help her, or may order her off, or may make her take a certain course, and put a commissioner on board; they may even detain her, if the gravity of the circumstances so require. She must be distinguished by being painted and marked in the prescribed ways, and make herself known by hoisting the prescribed flags. If the name of a military hospital ship shall have been communicated to the belligerent Powers at the commencement or during the course of hostilities, and in every case before she is employed, she shall be respected, and may not be captured while hostilities last.

If a hospital ship complies with the above provisions she is entitled to protection; but if she be used for any military purpose, either for aiding her belligerent owner militarily, or for injuring the enemy, that protection is lost. The fact that the staff is armed for maintaining order, and for defending the wounded or sick, and the fact of an apparatus for wireless telegraphy being on board, are not sufficient reasons for withdrawing the protection.



One other provision of the Convention may be mentioned. Article 16 says that, "After every engagement the two belligerents shall, as far as military interests permit, take steps to seek for the shipwrecked, the wounded, and the sick, and to protect them, as well as the dead, against pillage and improper treatment."

The test as to whether a ship claiming to be a hospital ship is entitled to protection is supplied by these provisions and conditions, and the result depends upon whether there has been a compliance with, and an adherence to, them.

The facts may conveniently be considered under certain heads.

In the first place, the circumstances must be investigated in order to ascertain whether the ship was in fact used for the humane and justifiable purposes prescribed by the Convention; or whether she was actually employed wholly or in part for military purposes, either in favour of the belligerent Power to which she belonged or against any other belligerent.

In the second place, the construction and equipment of the ship will be examined and put to the test, in order to find out whether they are consistent with the sole purpose of administering to the relief and succour of sufferers—namely, "the wounded, sick, and shipwrecked"—or with the object, wholly or partially contemplated, of aiding the belligerent owner and injuring the enemy in the military sense.

And lastly, the question will be considered whether the facts, and the reasonable inferences from the facts, together with the conduct of the officers in charge, lead to the conclusion that the ship was commissioned and intended to be employed solely as a hospital ship within the letter and spirit of the Convention; or as a ship ready to be used and to take part in services of a military nature, which, according to the Convention, would exclude her from the category of legitimate hospital ships, and preclude her from the protection accorded to them.

I will now state the material facts as they were established by the evidence.

The s.s. *Ophelia* was, up to the time of the war, a merchant vessel, trading chiefly between London and Hamburg. On August 3, 1914, she was in the Port of London. Pursuant to an order of the German Government conveyed through the German Consul-General, she was on that day directed (in the words of her log) "to steam to a German port for military duties."

On the next day (August 4) she received 344 passengers on board, and proceeded down the Thames on her voyage to Hamburg. War was declared between this country and Germany as from 11 P.M. on that night. On the afternoon of August 5, when she arrived at Norderney, she received orders from a German torpedo boat to steam to Heligoland. Next day she steamed to the Elbe, and having landed her passengers at St. Pauli landing stage, she proceeded to Hansa Harbour. On August 10 she was in Hamburg, and the entry in her log is: "The ship was refitted as a hospital ship by the Hamburg-America Line for the German Government." The next entry is: "August 12. Work on ship continued. Finished by the evening. Took in provisions." On August 13 she steamed down the Elbe, passed through the Kiel Canal, and anchored at Kiel. On the next day (August 14) Dr. Pfeiffer took over the command of the vessel as staff surgeon. Various alterations were afterwards carried out and inspections by fleet surgeons made. Subsequently the vessel proceeded to Brunsbüttel. While she was there, on September 11, 1914, the German Government issued a certificate declaring her to be a hospital ship.

This certificate, in German and in French, was found upon the vessel at the time of capture.

The translation of the French copy is as follows:

**"DESIGNATION OF THE MILITARY HOSPITAL SHIP 'F. OPHELIA'  
FOR THE WAR.**

"The military hospital ship *F. Ophelia* has been built by the German Government specially and solely with the object of giving help to wounded, sick, and shipwrecked persons. Her name has been communicated to the belligerent Powers. The Government undertakes to use these ships for no other military purposes (articles 1 and 4 of the Convention of October 18, 1907, for the adaptation to maritime war of the principles of the Geneva Convention).

"The Commandant of the Naval Station at Kiel.

"(Signed) BACHMANN,  
Vice-Admiral.

"Kiel, September 11, 1914.

"(L.S.)"

The claim put forward by Dr. Pfeiffer as staff surgeon or chief medical officer in control on behalf of the German Government, and his affidavit in support, state that "the ship completed her fitting out at Wilhelmshaven, whence she sailed on October 6, 1914."

Being examined in chief at the hearing, Dr. Pfeiffer answered his counsel's question as follows: "*Q.* You got your certificate as a hospital ship, I think, dated September 11?—*A.* Yes. *Q.* What was the first date on which the *Ophelia* was sent out?—*A.* On the evening of October 7, after the torpedo boat *S 116* had been sunk on the 6th."

But meantime the evidence shewed that the ship had left Brunsbüttel on September 18 for Heligoland, and remained at or near Heligoland for about a fortnight.

Dr. Pfeiffer was asked in cross-examination why the ship went on this voyage to Heligoland, and he answered as follows: "*Q.* The ship went on her voyage to the island of Heligoland in September?—*A.* Yes. *Q.* What did she do that for?—*A.* The ship had orders to go there. *Q.* So you were obeying orders given to you?—*A.* Yes. *Q.* And do you know the reason for the orders?—*A.* No. *Q.* So far as you know, had the orders anything to do with hospital service?—*A.* No; so far as I know, not. *Q.* Before the *Ophelia* made her voyage to Heligoland, there had already been fighting on the sea between Heligoland and Germany?—*A.* Yes, I heard so. *Q.* The previous month?—*A.* Yes, in August."

The ship left Heligoland on October 3, and proceeded under orders, presumably, to Wilhelmshaven. On Tuesday, October 6, about 8.45 A.M., she proceeded from Wilhelmshaven to Schillinghorn, and shortly before noon anchored in the Schillinghorn roadstead at the mouth of the Weser.

The circumstances of this and the two following days are very important, because on October 8 a British naval officer, commanding a British submarine, sighted the *Ophelia* engaged in certain operations which the claimants allege were performed solely in pursuance of her legitimate duties as a hospital ship, but on which the Crown rely as tending to shew that she was engaged on military duties inconsistent with an innocent hospital ship.

To go back to the morning of October 6, a German destroyer was sunk at about 11 (English time) off the river Ems. At this time the *Ophelia* was on her way from Wilhelmshaven to Schillinghorn, and she anchored there about 12.50 P.M., English time (11.50 mid-European time). She remained there at anchor for between eight and nine hours. At 8.30 (German time) in the evening she received orders to steam at once to the mouth of

the Ems. She weighed anchor, but about an hour later, when she got near a German warship—the *Beowulf*—she received a verbal order from that warship to go back. She accordingly returned and anchored again, at about 11 P.M., up the river.

The staff-surgeon in command of the *Ophelia* said the only orders he got on October 6 were to steam to the mouth of the Ems. He said afterwards that he thought something had been said about the sinking of the *S 116*, but he was not certain. He, in fact, did not know why he had been advised to go at 8.30 P.M. or why he had the counter-order not to go, but to return about ten o'clock.

On the next morning the *Ophelia* weighed anchor, but not until ten o'clock; she proceeded towards the mouth of the river Ems, but before reaching it she again anchored at 8.30 P.M. outside Borkum, and remained anchored until next morning (October 8), about seven o'clock. The place where the torpedo boat was sunk was known to Lieut. Guilleaume, the officer on watch of a torpedo boat which the *Ophelia* passed on this morning; but no enquiries seem to have been made of him, nor was any information obtained.

A flotilla of about five torpedo boats lay at the mouth of the Ems on the 7th and 8th, but none of them appears to have looked for survivors or helped the *Ophelia* to do so. The *Ophelia* is said to have reached the locality where the *S 116* was sunk about ten o'clock, and to have taken a zigzag course to the north and west for a distance of about three miles, and after employing herself for about an hour in this way she steamed back again at full speed up the Ems. There she remained anchored at two different places during the afternoon and night of the 8th and till the morning of the 9th, when, pursuant to orders, she voyaged back to Hamburg.

Forty-eight hours had passed between the sinking of the German torpedo boat and the arrival near the spot of the *Ophelia*. The distance from Schillinghorn to the place was about sixty miles. This she could cover in less than six hours. Even if she did not steam by night, she could have arrived in daylight on the 7th by about midday; she did not arrive, however, till about twenty hours afterwards. I heard no explanation of this lamentable and possibly fatal delay on the part of a hospital ship, said to have been on a mission to try to rescue survivors. She saw no survivors or corpses in her search, which was not only

belated, but which was very short and inadequate. There was an entire absence of the care, deliberation, thoroughness, and completeness to be expected in such a search.

But other things happened about the time of these events on the morning of October 8. The *Ophelia* saw a British submarine. It is logged that she sighted it at 9.30 A.M. (German time) about eleven miles from Schiermonnikoog, and again at 11.40, when seven or eight miles away.

The British submarine also sighted the *Ophelia*. The circumstances are set out in the affidavit of Lieut.-Commander Moncreiffe, and I will not recount them all. The hours are given in English time.

I will give a part of his story in his own words: "At 10 A.M., when the steamer was about four and a half to five miles from me, and was in a position which could be accurately described as near Schiermonnikoog, she evidently sighted me. She hoisted a large Red Cross flag at the main. At the same time dense black smoke commenced pouring out of the funnel, and she began to increase speed and bear away to the northward. I increased speed to eleven knots. At 10.5 A.M. the steamer altered course to east, still increasing speed, and she hauled down the Red Cross flag. There was no apparent reason for her to do so, unless the taking down of the flag was a signal to the enemy, or was a flag she was not entitled to fly. I also altered course east, thereby placing the steamer fine on my port bow. At 10.18 A.M. the steamer was right ahead, and I kept her right ahead by steering S.85E., and I chased her. She appeared to increase speed by about two or three knots. I did not signal to her to stop, because she was obviously running away from me, and I had no means of making her stop. At 10.30 A.M. it became clear I could not overtake her, so I reduced to seven knots and altered course to south. About 10.45 A.M. the steamer altered course to the southward. At 11 A.M. I altered course west, and lost sight of the steamer at 11.15 A.M. She was then still steering into the Western Ems. The steamer quite unmistakably fled from me after sighting me in order to escape search. I am confident that the steamer was the *Ophelia*, as she corresponds with the description of the *Ophelia* given in the affidavit of Commander Edward J. K. Newman, R.N., and not with that of any of the other German hospital ships with which I am acquainted, and the photographs exhibited to the said affidavit,

which I have inspected, are photographs of the steamer I saw as before described on October 8."

It was admitted at the hearing that the steamer was the *Ophelia*.

Lieut.-Commander Moncreiffe also says: "I had been patrolling in the neighbourhood since about 10 A.M. on October 7, and there was no reason that I can suggest why a hospital ship should have been where the *Ophelia* was, when I had her under observation on the 8th. There was nobody in the neighbourhood and no ship for a hospital ship to aid. With the exception of a German submarine, which I saw about twenty miles further west at 10.30 A.M. on the 7th, and a Zeppelin at about 2.45 P.M. on the 7th, I saw nothing besides the *Ophelia* on the 7th, 8th, or 9th. The German submarine dived as soon as she saw me. She appeared to be outward bound to sea." And further: "With reference to the entry in the *Ophelia's* log which has since been drawn to my attention, I am quite certain she was not searching for a sunken torpedo boat or any sunken vessel."

Dr. Pfeiffer denied that the *Ophelia* ran away from the submarine. Neither the navigating captain nor any one else was called to explain the operations of the ship on the morning of October 8.

In answer, however, to the allegation that, although the speed of the commander's submarine was increased to eleven knots, the *Ophelia* was able to get away, a strenuous attempt was made for the claimants to prove that the *Ophelia's* maximum speed capacity at her best was about ten knots, and that her full speed at the time in question was about nine knots. Dr. Pfeiffer said, "The maximum speed was  $8\frac{1}{2}$  to 9 miles." This attempt wholly failed. But it is not insignificant that the attempt was made. On the very last voyage of the *Ophelia* (as a merchant vessel from London to Hamburg) according to the records in her own log, in the twelve hours from midnight to midday on August 5, 1914, her average speed, according to her patent log, was over  $11\frac{1}{2}$  knots; and in the hour between 1 and 2 P.M. the log records 13 knots, while between 3.25 and 5.20 P.M. the patent log shews a run of twenty-seven miles, which is equivalent to a speed of over  $13\frac{1}{2}$  knots. No explanation of these telling figures was given. Moreover, a glance at the last log book of the vessel, which begins in May, 1914, will shew that on many voyages between London and Hamburg the

speed recorded by the patent log goes up to 11,  $11\frac{1}{4}$ ,  $11\frac{1}{2}$ ,  $11\frac{3}{4}$ , and 12 knots. It is to be remembered, too, that on October 8, apart from the spurt which Lieut.-Commander Moncreiffe suggests was given to the engines, the *Ophelia* was in ballast and in excellent trim for travelling.

Upon the disputed question which the account given by the commander raises, one naturally asks why, as the hospital ship saw the submarine more than once, she did not speed towards it rather than away from it, in order to try to get some information about the *locus* of the accident, or the saving of the seamen, or the possibility of rescuing survivors? Those in command of a genuine hospital ship on a humane quest would not fear any harm or ill-treatment from a British submarine or any other war vessel.

After the order received by the *Ophelia* on the evening of October 8 to go to Hamburg she seems to have proceeded leisurely, arriving there on the 10th. She remained there till the 15th, and in the interval her two masts were lengthened in order to improve and increase the range of the wireless telegraphy.

It now remains to see how the *Ophelia* was employed from this time until her capture. On the 15th she left Hamburg and anchored during the night in the Elbe, and then went on another voyage to Heligoland. Captain Ridder joined her as navigating captain on October 16. He was only on the vessel for three days. No other navigating officer was called who could speak of the dates between September 11 and October 15. Dr. Pfeiffer always followed orders in directing the movement of the ship. He gave no reason for or explanation of this last voyage to Heligoland. While there, in the evening of October 17 (some time after 7 P.M.), he said that he received by wireless telegraphy, sealed, and in code, from the German battleship *Württemberg*, a message, of which the translation was given as follows: "Wireless message from *Württemberg* to Auxiliary Hospital Ship *F*. Sealed.—7 P.M., October 17, 1914.—Go at once to Haaks (Finger) Lightship. Further instructions to follow—TROSS CHIEF."

The vessel accordingly was put on a course for the Haaks lightship. A little after one o'clock, not having received any further instructions, and not knowing what he had been ordered down there for, Dr. Pfeiffer sent a message by wireless telegraphy to the station at Norddeich. It was sent in code, and the effect

of it was given to the Court as follows: "Please send following telegrams to *Württemberg*: Am at Haaks Lightship. Request further instructions." Shortly afterwards the following reply was received on the *Ophelia* from the Norddeich station: "Search 3° 55' east, 52° 51' north, and neighbourhood.—Norddeich."

These two messages were heard, although not understood, by the wireless telegraphy operator on board H.M.S. *Lawford*, then on patrol duty in the North Sea. He instantly reported this to Lieut.-Commander Scott, and said the strength of the signals indicated they were sent in their vicinity. Very shortly afterwards the *Ophelia* was sighted. She was signalled to stop by a squadron of British warships, and Lieut.-Commander Peters, of H.M.S. *Meteor*, boarded her; but before he came several documents were thrown overboard from the *Ophelia* by command of Dr. Pfeiffer, as will be stated later when I deal with the destruction of papers then and at a later date.

As to what took place when Lieut.-Commander Peters came on board, the following answers were given by Dr. Pfeiffer: Q. What took place when Lieut.-Commander Peters came on board?—A. Lieut.-Commander Peters asked me why we were there—what we were looking for there. In the first place, I answered him, saying I did not know. [THE PRESIDENT.—Answer both those questions. Why are you here? What are you looking for?—A. He asked me for what reason we were in that region. I told him that I had been ordered to come there, and I knew nothing more.

This agrees in substance with the account given by Lieut.-Commander Peters in his affidavit.

Some ship's papers were given up to the Lieut.-Commander, but, so far as the Court was informed, nothing was said about the papers or documents which had been thrown overboard. On this day the *Ophelia* was captured, ordered to haul down her flag, and taken into an English port for the purpose of being dealt with by this Court in Prize.

Having stated what was done by the *Ophelia*, and how she was employed, so far as the facts were disclosed, it might be convenient here to state briefly what was not done. In a sentence, no wounded, sick, or shipwrecked person was ever on board the ship; not a hospital cot, bandage, or surgical instrument had been used, either on the ship or in connection with it, and no service



had ever been rendered or offered to any wounded, sick, or shipwrecked person, by the *Ophelia* or any of her staff. This is not conclusive against her, of course, if otherwise it appeared that she was equipped and kept in readiness to render such service where it could be rendered.

After the ship was captured and brought into port, she was, of course, examined as to her construction and equipment as a hospital ship. With these matters I will deal shortly. I will premise that there is no standard of suitability, either of construction or equipment, for a hospital ship, and it was said that the *Ophelia* was only intended as an auxiliary ship.

In addition to the evidence given *viva voce* on behalf of the claimants, and that supplied for the Crown in the affidavit of Commander Newman, R.N., I made observations myself on the inspection of the *Ophelia*. The description of the vessel, and of her accommodation, sanitary arrangements, and equipment is accurately given by Commander Newman in his affidavit, and it would be useless to repeat it here. His conclusion was that, according to the requirements and standard of the British Admiralty, the *Ophelia* was quite unsuitable for the purpose of a hospital ship. He so reported in the circumstances which he sets out. There being no standard available as a test of suitability in all cases, while accepting entirely the statements of Commander Newman, I am not prepared to say (although the deficiencies which were pointed out undoubtedly existed) that the ship was not in fact adapted, albeit inadequately and imperfectly, for the proper purposes of a hospital ship. Whether she was constructed and adapted solely for such purposes is a wholly different matter.

Upon this question, the apparatus and appliances suitable for signalling purposes, which at the time of capture still remained upon the ship, have a bearing of significant importance. She carried a surprisingly large number of Verey's lights of different colours—namely, 600 green, 480 red, and 140 white lights; Verey's pistols, flares, small signal rockets, blue lights, Holmes' distress flares, besides ten large signal rockets of unusual strength for signalling purposes. As compared with these, Commander Newman deposed that the number of Verey's lights which, according to Admiralty regulations, are to be carried by a battleship or battle-cruiser in H.M. Navy, is only 100 green, 100 red, and 300 white; while the number to be carried by an auxiliary ship,

or corresponding ship, would be only twelve of each. The conclusion to which Commander Newman, with his experience, came, before he had any knowledge that the *Ophelia* was suspected as a signalling ship, was that "she was undoubtedly fitted and intended for signalling purposes."

The evidence given to the Court as to what quantity of these lights and signalling apparatus had in fact been used was very unsatisfactory. The evidence of the times and purposes for which they were used was, if anything, still more unsatisfactory. As to the latter, it was said by Dr. Pfeiffer that they were used, in part, to acknowledge Morse signals, and he suggested that they might even be used for lighting up parts of the sea in search for bodies. No evidence whatever was given of any such user, nor was any reliable evidence given of their being adapted for any such use, and it is not easy to see how the red and green lights would be serviceable for lighting up the waters. There were signalmen on board, who were vouched by Dr. Pfeiffer; but not one of them was called to state how the lights had in fact been used.

As to the quantity which had disappeared Dr. Pfeiffer was not able to testify, but for his purpose he vouched the paymaster, Herr Urbanck, who had charge of the stores. When this witness was called, he said that it was the duty of Dr. Pfeiffer to check the number of lights that were placed on board, and to check the number that had been used. The paymaster, however, kept store books and inventories, which, he said, would have given the exact figure shewing how many lights had been consumed, and how the number used was distributed between red, white, and green.

To the astonishment of the Court, the cross-examination of this witness elicited that these records were burnt by him when the ship lay in the Thames, a fortnight or more after the original capture. They were not thrown overboard with those documents which Dr. Pfeiffer consigned to the deep just before the search. They were burnt by the instructions of the staff-surgeon, Dr. Pfeiffer. Of the burning of these records Dr. Pfeiffer did not vouchsafe a word in his evidence.

This leads me to point out how seriously the Prize Courts have regarded the destruction of documents—usually described in the terminology of the Courts as "Spoliation of documents." The cases have usually dealt with the spoliation of documents like ship's papers and documents relating to cargoes. Hospital ships

were little known in former days, but, in my opinion, the principles apply equally forcibly, to say the least, to documents which would throw light upon the way in which a ship, purporting to be solely a hospital ship, had been employed.

There is a useful summary of the effect of the cases in the judgment of Dr. Lushington in *THE JOHANNA EMILIE* [1854] (Spinks, 12, at pp. 20, 22; 2 Eng. P.C. 252, at pp. 262-264). I take out the following passages: "I must say a word as to the spoliation of papers generally. I do not know that there is to be found in any of Lord Stowell's judgments any direct definition of the word 'spoliation.' I am of opinion that the mere destruction of papers is not, under all circumstances, to be considered a spoliation; I say, under all circumstances, because the principle might be carried to a very absurd length. I apprehend it might be said, if at any time during a long voyage the master destroyed papers that had no relevancy to it, relating to a former voyage, the matter would not be put in issue. To say that was a spoliation of papers would be going the length of saying that nothing in the nature even of a private letter was to be destroyed after the vessel had left her port. I am not, however, disposed to relax the practical effect of the rules laid down by Lord Stowell, because they are consistent with good sense, and with justice to all parties, but they must not be pressed beyond his true intention with reference to all the facts of the case. . . ." "Now let me say a word on this, as to the time at which the papers are destroyed. I pray that my meaning may not be understood beyond the words I use. I hold time to be of great importance. If papers are destroyed when the capturing vessel is in sight, or there is a chance of capture, it is the strongest proof that these papers contain some matter which would inure to condemnation; so it is if they are destroyed at the time of capture, and if they are destroyed clandestinely after capture; but if the papers are destroyed a long time antecedently, before there is any probability that they were destroyed for fraudulent purposes, and there is no evidence that it was for fraudulent purposes, then, though there is spoliation, and though, no doubt, the inference of law is against the act during war, yet the case is of a less stringent nature."

Upon this important subject I will also cite what Chancellor Kent says in his well-known *Commentaries on American Law*: "The concealment of papers material for the

preservation of the neutral character justifies a capture, and carrying into port for adjudication, though it does not absolutely require a condemnation. It is good ground to refuse costs and damages on restitution, or to refuse further proof to relieve the obscurity of the case, where the cause laboured under heavy doubts, and there was *prima facie* ground for condemnation independent of the concealment. The spoliation of papers is a still more aggravated and inflamed circumstance of suspicion. That fact may exclude further proof, and be sufficient to infer guilt; but it does not, in England, as it does by the maritime law of other countries, create an absolute *presumptio juris et de jure*; and yet a case that escapes with such a brand upon it is saved so as by fire. The Supreme Court of the United States has followed the less rigorous English rule, and held that the spoliation of papers was not, of itself, sufficient ground for condemnation, and that it was a circumstance open for explanation, for it may have arisen from accident, necessity, or superior force. If the explanation be not prompt and frank, or be weak and futile; if the cause labours under heavy suspicions, or there be a vehement presumption of bad faith, or gross prevarication, it is good cause for the denial of further proof; and the condemnation ensues from defects in the evidence, which the party is not permitted to supply"—vol. i. (12th ed.), p. 158.

These are sound and salutary doctrines. In my judgment they are in a special sense applicable to ships claiming to be hospital ships. In proportion to the immunity and protection which every belligerent Power, actuated by feelings of humanity, would desire to extend to ships engaged in aiding and rescuing those who suffer in maritime war, the conduct of those ships should be beyond suspicion. About the innocence of hospital ships from engaging in warlike services there ought to be no question. Their records should be clean. If they are, their preservation would be an additional safeguard against capture. If they are not preserved, but destroyed, the inference that, if produced, they would be silent but eloquent witnesses of guilty practices, would be strong.

As to some of the documents on board, such as the secret codes for wireless telegraphy, the Law Officers of the Crown did not complain of their destruction. In my view, even documents like these ought not to be destroyed. They might be required in order to test the accuracy of the versions given of messages sent and received. They could quite appropriately be sealed up if

that were deemed advisable, and so sealed they would not be opened except under the strict superintendence of the Court, and the belligerents might rest assured that no disclosure would be made or allowed which would in any way affect the belligerent.

But whatever might be said in justification or palliation of the destruction of documents of this nature, by reason of the orders of those in high command or otherwise, some of the other documents which were destroyed should certainly have been preserved and given up. Books recording messages transmitted or received by wireless telegraphy, or by any form of signals, directing the operations of the ship, ought to be kept. If such messages related to the legitimate work of hospital ships they would not harm those in charge or prejudicially affect the ship itself. If they are destroyed on the eve of capture no one could reasonably complain if unfavourable inferences were drawn.

For the burning, in November (some fortnight or more after the ship was captured), of the records of the various signalling lights which had been supplied, and which had been used upon the ship since she set out as a hospital ship, I see no justification whatsoever. In their absence, such evidence as was given about them, and the use to which they were applied, meagre as it was, is rendered worthless. By the express terms of the Convention, the right of search of hospital ships is given to belligerents. If those in charge of such ships can with impunity destroy all the documents and records of the ship immediately before a searching officer boards her, the right of search becomes to a great extent nugatory.

After a careful and anxious consideration of all the circumstances of the case, I find that the *Ophelia* never in fact rendered any help, succour, or service whatsoever to any single wounded, sick, or shipwrecked man; that she made no real effort at any time to render any such service; that her construction and equipment, although to some extent made adaptable, were not *well* adapted for the purposes of a hospital ship; that she was well equipped for the purpose of acting as a signalling vessel; that considerable signalling appliances had been used, and that no satisfactory account was given of why, how, or when they were used; and that her officers complied, and were at all times ready to comply, with any orders from the German ships of war, or ships on auxiliary services.

The conclusions to which the evidence compelled me to come, are that the *Ophelia* was not constructed, adapted, or used for the special and sole purpose of affording aid and relief to the wounded, sick, and shipwrecked, and that she was adapted and used as a signalling ship for military purposes. She has therefore forfeited the protection claimed under the Convention.

The decree of the Court is that the *Ophelia*, being an enemy ship, is condemned as lawful prize.

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*Solicitors*—Treasury Solicitor; Hewitt, Urquhart & Woollacott, for claimant.

[*Reported by E. C. Trehern, Esq., Barrister-at-Law.*]

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[IN THE ROYAL COURT OF ST. LUCIA. IN PRIZE.]

COLLER, C.J. Oct. 30, 1914.

### THE LORENZO.

*Neutral Vessel — Contraband — Belligerent Charterers — Unneutral Service—Owners' Ignorance—Declaration of London, 1909, art. 40.*

*By article 40 of the Declaration of London, 1909, "a vessel carrying contraband may be condemned if the contraband . . . forms more than half the cargo":—Held, that such a vessel is lawful prize, notwithstanding that her owners have no knowledge that she was being employed in carrying contraband.*

Suit for condemnation of ship as prize.

The *Lorenzo*, a steamship belonging to the New York and Porto Rico Steamship Co., was chartered by the Hamburg-Amerika Line for a voyage from New York to Buenos Aires with a cargo of coal and provisions. She left New York on August 6, 1914, two days after war broke-out between Great Britain and Germany, but instead of proceeding to Buenos Aires, by order of the German supercargo she went to a rendezvous for the purpose of coaling the German cruiser *Karlsruhe*. On September 10, whilst steaming up and down in company with three other colliers

waiting for the cruiser, she was captured by H.M.S. *Berwick* and brought into St. Lucia as prize.

The owners of the *Lorenzo* claimed her release on the ground that they neither knew nor suspected that she was to be employed in carrying contraband, or in any unneutral service.

*Drysdale*, for the Crown.

*Degazon* and *Palmer*, for the claimants.

COLLER, C.J.—This merchant vessel, the property of the New York and Porto Rico Steamship Co., was chartered by the Hamburg-Amerika Line, ostensibly for the purpose of carrying coal and provisions to an unnamed consignee in Buenos Aires. The ship's papers were of the scantiest description, but the penalty clause in the charterparty was unusually full; it provided that if from any cause whatsoever, including war risks, the charterers failed to re-deliver the ship to the owners at the expiration of the time specified in the charter, they were to forfeit the sum of \$350,000. The *Lorenzo* left New York on August 6, and was seized by H.M.S. *Berwick* on September 10. She was then about 200 miles S.E. of Barbadoes, and some 350 miles out of her proper course.

The charterers were empowered to appoint a supercargo, his duty being to see that the voyage was prosecuted with the utmost despatch. They appointed Felix Seffner, a lieutenant in the German Naval Reserve, who promptly contrived to secure that the voyage should not be prosecuted at all. No sooner was the pilot dropped off Sandy Hook than Seffner informed the captain that their real destination was not Buenos Aires, but a position fifty miles west of Plana Cays. The course was changed accordingly, and the position was made six days after leaving New York. Upon arrival they saw the *Thor*, and presently the *Spreewald* and the *Neckar*, all having evidently the same vague destination, and presumably the same object in view. It actually occurred to the captain that this might be a rendezvous, not wholly unconnected with the war. He steamed up and down, sometimes fast and sometimes slow, and the three consorts did the same, waiting, as he was told, for further orders.

The precise object of this manœuvre was sufficiently revealed on the second day after their arrival, when Seffner informed the third officer on the bridge, in the captain's presence, that the

*Karlsruhe* was expected that night and he must keep a sharp look-out for her; she would signal with her flash-light and shew the D in Morse. However, no German cruiser came, and the *Lorenzo* continued to steam up and down in company with her three consorts, until on the fifteenth day another Hamburg-American liner, the *Presidente*, came up and ordered them to repair to the lower rendezvous, where the *Lorenzo* was ultimately seized.

There for eight days they resumed their pilgrimage, carefully avoiding the prying curiosity of passing vessels, until the arrival of H.M.S. *Berwick* abruptly terminated the adventure.

In face of these facts I felt no hesitation about condemning the cargo, which nobody claimed. But the owners claim the ship on the ground that they neither knew nor suspected that the *Lorenzo* was to be employed in carrying contraband or other cargo intended for German warships, or in any unneutral service, nor would they have consented to any such employment, and they have filed an affidavit to that effect. The question thereupon arises, Does the absence of complicity on the part of the owners affect in any way the liability of the ship?

The condemnation of a vessel for carriage of contraband is now governed by article 40 of the Declaration of London, to which, with certain modifications, His Majesty has signed his adherence for the purposes of this present war. It reads as follows: "A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume or freight, forms more than half the cargo." Counsel for the claimants laid great stress on use of the permissive "may" in place of the obligatory "shall," arguing that this had deliberate regard to the presence or absence of complicity. The official commentary throws no light on this particular point. But I have learned in this colony that, for the interpretation of a code, recourse may be had to the deliberations of the codifiers, who, unlike members of Parliament, are presumed to have expert knowledge of the matters which they discuss. And upon reading the *Proceedings of the International Naval Conference*, the intention becomes reasonably clear.

The problem at the outset was, whether the liability of a ship to condemnation for carriage of contraband should be determined—first, by the proportion of contraband to the whole cargo; secondly, by the guilty knowledge, actual or presumed, of owner, master, or charterer; or thirdly, by some combination of both



these elements. In the committee's report, at page 311. it is stated that practical considerations had brought them to the conclusion that the notion of complicity would afford no safe criterion, and that they were therefore forced to rely solely on the relative proportion of contraband to the whole cargo. It follows, therefore, that article 40 works automatically. Whenever more than half the cargo carried on a neutral vessel is contraband, the vessel becomes the lawful prize of the captors. This result, at any rate, enables neutral shipowners to know precisely how they stand; the wise among them will get an adequate indemnity from their freighters or charterers, so that if their ship is used for unneutral purposes they will be in the same secure position as are the owners of the *Lorenzo* to-day.

There is, therefore, no necessity for me to decide what precise degree of credit attaches to the owners' affidavit, or to consider whether the service rendered, or sought to be rendered, amounted to a graver infraction of neutrality than mere carriage of contraband. It is enough, for the purposes of this claim, that the whole cargo of the *Lorenzo* was contraband, in that it consisted of coal and provisions destined for the armed forces of the enemy.

The vessel must be condemned. There will be the usual order for appraisement and sale, the sale to be by public auction or by private contract, as the Court or Judge may direct.

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[IN THE ROYAL COURT OF ST. LUCIA. IN PRIZE.]

COLLER, C.J. Oct. 30, 1914.

### THE THOR.

*Neutral Vessel—Unneutral Service—Coal for Belligerent Cruiser—Declaration of London, 1909, art. 46.*

*Before a state of war existed between Great Britain and Germany, a neutral vessel left a neutral port, ostensibly bound for another neutral port with a cargo of coal. Unknown to her owners, her destination was changed, and she was sent by the supercargo (an officer in the German Naval Reserve who was put on board by German sub-charterers) to coal German warships. While waiting for this purpose, some weeks after the outbreak of*

war, she was captured by a British cruiser :—Held, that the vessel had been guilty of unneutral service, as she was “ under the orders or control of an agent placed on board by the enemy Government,” and was “ in the exclusive employment of the enemy Government ” within the meaning of article 46 of the Declaration of London, 1909, and that she must be condemned.

Suit for the condemnation of the Norwegian steamship *Thor* as prize.

The *Thor*, which had been sub-chartered to the Hamburg-Amerika Line, whilst waiting to coal a German cruiser, was captured by H.M.S. *Berwick* and brought into St. Lucia. It was contended by the Crown that, although, as the *Thor* left port before the outbreak of war, she could not be condemned for carrying contraband, she was lawful prize, as her conduct amounted to unneutral service.

The facts are fully stated in the judgment.

*Drysdale* and *Brice*, for the Crown.

*Degazon* and *Palmer*, for the claimants.

COLLER, C.J.—On August 3, 1914, the *Thor*, a Norwegian steamer chartered by the Inter-American Steamship Line, was in harbour at Newport News, Virginia. She had taken in some 2,000 tons of coal, her papers were in order, and she was intending to sail that evening for Fray Bentos, in Uruguay. Yet, from August 9 to 26 she was steaming up and down a position fifty miles west of Plana Cays, in company with two German colliers and one other neutral collier chartered by a German firm, all clearly waiting for something to coal. Again, from September 2 to 9, when she was seized by H.M.S. *Berwick*, she was pursuing the same tactics in the same company in a position 200 miles S.E. of Barbadoes, being at the time 350 miles out of her course after thirty-five days at sea. It is known that there were German cruisers in the Western Atlantic, so that the motive of this employment is sufficiently obvious. But what caused the sudden change of plan?

Destiny seems to have intervened in the shape of a German supercargo named Weiler, a chief petty officer in the German Naval Reserve. He came on board, closely followed by twenty tons of provisions, and presented the captain with the following letter

from his charterers: "We beg to inform you that we have re-let the steamer for about three months to the Hamburg-Amerika Line, of New York, and in accordance with clause 12 they will send a supercargo with your steamer whose instructions you will please follow. We request you to do all possible for the interests of the Hamburg-Amerika Line; and their superintendent, who goes with the steamer, has instructions to allow you very liberal gratuities."

Whether the captain was influenced by the prospect of these liberal gratuities, or, as I think, by the desire to obey his charterers, he certainly followed Weiler's instructions. To quote his own words: "I went where the supercargo told me to go, and did what he told me to do: the ship was entirely at his disposal." He qualified this afterwards by saying, "so far as the delivery of the cargo was concerned," but that merely meant, I think, that he would not have taken a direct part in hostilities. The supercargo ordered him first to the upper and then to the lower position; while there he steamed up and down as he was told. The supercargo got the first order from the office of the Hamburg-Amerika Line; the second came from a Hamburg-Amerika liner through the *Neckar*. Clearly these orders were the orders of the enemy Government; no one else could have fixed the position where cruisers would repair to get provisions and coal.

Inasmuch as the *Thor* left Newport News before the declaration of war she is exempt from confiscation for carriage of contraband. It therefore becomes necessary to consider whether her behaviour amounted to unneutral service, and for that purpose to ascertain what modification, if any, has been effected by the Declaration of London in the law on that point.

The English rule was this: "A neutral vessel chartered or employed by a belligerent Government to carry a cargo on its behalf and acting under the orders or direction of that Government or of its officers is liable to condemnation as an enemy ship, together with the cargo so carried"—THE REBECCA [1811] (2 Acton, 119). The formula submitted to the Conference was more epigrammatic, but equally effective; it provided that merchant vessels "entièrement ou spécialement au service du belligérant ennemi" should lose their neutral character. It was argued that the use of terms so vague might lead to conflicting interpretations, and the suggestion was made that it would be better to

enumerate specific instances. No objection was offered to this, although stress was laid on the difficulty of giving concrete examples of a principle so essentially modern, and it was instanced that in the days of sailing ships there was no necessity for chartering neutral colliers. Ultimately the new rule emerged (so far as relevant) in this form: "A neutral vessel is liable to condemnation . . . (2) If she is under the orders or control of an agent placed on board by the enemy Government; (3) If she is in the exclusive employment of the enemy Government."

I confess, with great respect, that I do not think the change altogether happy, nor do I find the rule, as enunciated, particularly clear. It would, I think, have been better to say, "If she is chartered or employed by the enemy Government or its agents for purposes of transport or supply." But, just as the meaning of an impressionist picture is explained on reference to the catalogue; so the intention of paragraph (3) becomes obvious when you read the official commentary. This document expressly brings transports within the scope of the paragraph, and adds the words: "Such is the position of colliers which accompany a hostile fleet." Counsel for the claimants, in a supreme effort, argued that you cannot accompany a hostile fleet if there is no hostile fleet to accompany; but I think the offence lies rather in the intention of the employment than in its literal fulfilment. Moreover, in this particular case, I think the supercargo was placed on board by the enemy Government or by its agents, the Hamburg-Amerika Line.

It follows that the *Thor* must be condemned as lawful prize. The cargo has already been condemned in default of appearance. The order will follow the form already settled.

I must add one word on the correspondence of liability with fault. The Norwegian owner, his New York agents, the captain, and the crew, were clearly free from any complicity. But I cannot credit the affidavit of Mr. Frederick E. Hasler on behalf of the charterers. He must have known perfectly well on August 2 or 3 that the Hamburg-Amerika Line wanted this small steamer laden with coal for some purpose connected with the then imminent war. Probably he obtained an indemnity from his sub-charterers, as well as a good price for the four months unexpired. One object of these rules of International Law is to prevent hardship from falling upon innocent persons; if my suspicions are correct they will have their remedy in the present case.

[SUPREME COURT OF BERMUDA. IN PRIZE.]

SHERIFF, C.J., INGHAM, J., BLUCK, J. Nov. 20, 1914.

## THE LEDA.

*Enemy Ship—Capture at Sea—Neutrals' Claim as Beneficial Owners—Prize Court Rules, 1898—Further Proof—Declaration of London, 1909, art. 43—Prize Court Rules, 1914, Order XXVIII. rule 1—Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 20—Prize Courts (Procedure) Act, 1914 (4 & 5 Geo. 5. c. 13).*

*A merchant vessel, flying the German flag, was captured at sea by a British cruiser four days after the outbreak of war between Great Britain and Germany, and was taken into Bermuda. Proceedings in prize were commenced against her before September 3, 1914, when the Prize Court Rules of 1914 came into force in that colony, and the Court directed that the action should be continued in accordance with the procedure applicable under the Prize Court Rules, 1898. An application for further proof was made on behalf of a neutral company, in order to establish that they were the beneficial owners of the vessel, owning the entire capital stock of the nominal owners, a subsidiary company established according to the law of Germany, and having its principal place of business in Hamburg:—Held, first, that the application must be refused, as the vessel, being under the German flag, and the claimants not alleging that she had been transferred to them, the facts sought to be proved would not benefit the claimants; secondly, that section 20 of the Naval Prize Act, 1864, which requires the Court . . . "to proceed with all convenient speed either to condemn or to release the captured ship," was still in force for the purposes of the present case, and that Order XXVIII. rule 1 of the Prize Court Rules, 1914, which provides for detention in certain cases, had no application; thirdly, that article 43 of the Declaration of London, 1909, which provides that "if a vessel is encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband which applies to her cargo, the contraband cannot be condemned except on payment of compensation; the vessel herself and the remainder of the cargo are not liable to condemnation . . .," only applies to ships other than enemy vessels having contraband on board;*

*fourthly, that the claimants' contention that the vessel should be merely detained, and not confiscated, must be rejected.*

Cause for condemnation of ship as prize.

The *Leda*, a steel screw steamship of 6,766 tons gross, fitted with wireless telegraphic apparatus, flying the German flag, and owned by a German company, the Deutsch-Amerikanische Petroleum Gesellschaft, whilst bound from Rotterdam to Baton Rouge, U.S.A., in ballast, was captured at sea on August 8, 1914, four days after the outbreak of war between Great Britain and Germany, by H.M.S. *Suffolk*, and was taken into Bermuda. A writ was forthwith issued on behalf of the Crown claiming condemnation of the ship as prize.

On September 3, 1914, the Prize Court Rules, 1914, came into force in Bermuda, but, the case having been commenced before that date, the Court ordered that it should be continued in accordance with the procedure applicable under the Prize Court Rules, 1898. Accordingly, standing interrogatories were administered to the master and officers of the *Leda*.

An appearance was entered on behalf of the Standard Oil Co., a neutral company carrying on business in the United States of America; and at the hearing an application was made on their behalf for further proof, in order to establish that they were the beneficial owners of the *Leda*, owning the entire capital stock of her nominal owners—a subsidiary company of the claimant company, formed in Germany in order to market the petroleum shipped by the claimants. The order for further proof was refused, and it was then contended on behalf of the claimants that the vessel should be detained and not confiscated.

The arguments sufficiently appear from the judgment.

*The Attorney-General (Reginald Gray, K.C.), for the Crown.*  
*Conyers, for the claimants.*

SHERIFF, C.J.—This case having been commenced before the Prize Court Rules of 1914 came into operation in this colony, the Court, then consisting of the two Assistant Justices, directed, under the authority of the Prize Courts (Procedure) Act, 1914 (4 & 5 Geo. 5. c. 13), s. 1, sub-s. 2, that the proceedings should be continued to their termination in accordance with the procedure applicable to the case at the commencement thereof. This case

consequently has been conducted under the Prize Court Rules of 1898.

From the standing interrogatories it appears that the *Leda* was captured on August 8 last by H.M.S. *Suffolk* at sea, on a voyage from Rotterdam to Baton Rouge, and brought into Bermuda. The master, R. W. H. Klemz, described himself as being a German subject. He stated that the *Leda* was under German merchant colours when captured; that he was appointed her master by the owners; he took possession at Kiel on January 6, 1914; possession was delivered to him by the Deutsch-American Petroleum Co. of Hamburg, Germany. In reply to the interrogatory, "Under whose direction and management has she usually been with reference to her employment or trade?" the master answered, "The owners"; and to the next question, "With whom do you correspond on the concerns of the vessel, or her cargo?" he replied, "To the owners in Hamburg and our agent in New York." In reply to the interrogatory, "Who were the owners of the ship concerning which you are now examined at the time she was seized?" he answered, "The present company." He described them as being of German and American nationality, as far as he knew. In reply to the interrogatory, "Do you verily believe that if the ship be restored she will belong to the persons now asserted to be her owners, and no others?" he answered, "I believe she will still belong to the Deutsch-American Petroleum Co." In reply to the interrogatory, "By whom and to whom has the said ship ever been sold or transferred?" he answered, "She has never changed ownership since she was built, as far as I know." Again he stated, "I believe that the ship *Leda* belongs to the Deutsch-American Petroleum Co.; she was destined for Baton Rouge; there was no cargo on board." R. F. Huss, chief officer, a German, stated that they left Rotterdam on July 23 last; that the ship was usually under the direction and management, as to her employment or trade, of the owners of the company; the owners of the ship, he said, were the Deutsch-American Petroleum Co., Hamburg, who he believed were Germans or belonged to Germany. The chief engineer, a German subject, stated that the *Leda* had been trading in oil between Europe and the United States; she was captured on her fourth voyage; she had no cargo then, and was flying the German merchant colours. He stated that he believed that if the ship were restored she would belong to the persons now asserted to be her owners, but he was not able

to say who were the owners of the ship at the time she was seized. I feel obliged to state that I consider the answers given to the standing interrogatories by these three persons are very unsatisfactory. In the taking of these interrogatories, rule 33, as to putting every question separately to the witness, appears to have been overlooked.

At the hearing the Attorney-General applied for the condemnation of the ship; counsel for the claimants applied for an order directing further proof.

In order to inform the Court what facts he desired to bring out, counsel for the claimants was permitted to read from a document purporting to be an affidavit of a Mr. Alfred C. Bedford, treasurer of the Standard Oil Co. If the order for further proof were granted, this evidence would be put in as the whole or part of such proof as the Court might direct. The reason for counsel desiring to get this document to the notice of the Court is obvious. The Court was pleased to have the information it conveyed, but declined to admit it, or any other evidence, by way of further proof. This document elaborates merely the affidavit of George Henry Jones, filed with the claim. From this document it appears that the facts concerning which the claimants desired to give further proof were, that since the construction of the *Leda* in 1913 they had been the real and beneficial owners of the ship, and that they owned and had in their possession the entire capital stock of the Deutsch-Amerikanische Petroleum Gesellschaft, the nominal owners of the ship since she was built; that she was a seagoing vessel, and was registered, when seized, as of the port of Hamburg in the name of the said company, a corporation organised and existing under the laws of Germany, and having its principal office in Hamburg; that it was a subsidiary company of the Standard Oil Co., organised with the latter's capital for greater convenience in the carrying on of its trade in foreign countries, the subsidiary company's sole business being the marketing of petroleum and its products shipped by the claimants; that the subsidiary company, on August 8 last, owed the claimants over three million dollars for oil; that the *Leda* and other vessels were built for claimants out of the United States, as the cost of construction abroad was less than that in the United States, and also because it was economically impracticable to operate American-built vessels under the American flag, owing to the burdensome character of the United States navigation laws;



that the claimants had advanced the subsidiary company over seven million dollars to build tank steamers, the *Leda* being one; that the subsidiary company gave bonds to the claimants, which bonds belong to, and are the registered property of, the claimants.

It appears to me that the claimants requested this Court to order further proofs that they, a company in the United States, are also a company in Germany, carrying on trade there up to, at all events, October 31, 1914, the date of Mr. Bedford's affidavit. To do this would not improve their position. As I understand the claimants' case, they claim the ship and do not put in any claim to a lien on the ship, or else they would be met by the decision in the case of *THE ARIEL* [1857] (11 Moo. P.C. 119; 2 Eng. P.C. 600), where, on appeal, it was held that liens, whether in favour of a neutral on an enemy's ship or in favour of an enemy on a neutral ship, are equally to be disregarded in a Court of Prize.

On the question of further proof, the claimants' counsel quoted *THE OCEAN BRIDE* [1854] (Spinks, 66; 2 Eng. P.C. 309), and argued that if the claimants were the true owners of the *Leda* the Court might order restitution of her to the claimants, although the registered owner was the German company carrying on business in Germany—in short, an enemy. The distinction to be drawn between *THE OCEAN BRIDE* (Spinks, 66; 2 Eng. P.C. 309) and the present case is, in my opinion, that in the former case the ownership in a firm in an enemy's country was fictitious, the transfer of it by an English firm to the former owners was not *bona fide*. Here, the registered owner is a firm in Germany carrying on trade there, and, according to all the authorities, an enemy—see *THE ABO* [1854] (Spinks, 42; 2 Eng. P.C. 285), *THE GERASIMO* [1857] (11 Moo. P.C. 88; 2 Eng. P.C. 577), and *THE ARIEL* (11 Moo. P.C. 119; 2 Eng. P.C. 600). There has been no transfer to the claimants from the subsidiary company; there was no offer to produce further proof of a sale to them in consideration of certain moneys advanced or otherwise. The possession of the ship when captured was not in a company carrying on business in a neutral country, but in a company carrying on business in an enemy's country.

“And if a war breaks out, a foreign merchant has a reasonable time allowed for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated for the purposes of the trade as a subject of the Power

under whose dominion he carries it on, and of course is an enemy of those with whom that Power is at war"—*per* the Right Hon. T. Pemberton Leigh, in delivering the judgment of the Privy Council in *THE GERASIMO* (11 Moo. P.C. 88, at p. 96; 2 Eng. P.C. 577, at pp. 582, 583). The same remarks must apply to a company equally well as to an individual.

The Court declined to order further proof on the ground that whether this ship, built in Germany, with a German register, registered in the name of a German company, carrying on business in Germany, with German ship papers, commanded by a German master, manned for the most part by Germans, flying the German flag, could be considered anything else but a German ship, even if the entire stock of such a German company belonged to individuals or to a company of a neutral State.

An order for further proof having been refused, counsel for the claimants contended that the Court should make an order of detention, and not one of condemnation. He submitted that the effect of article 57 of the Convention of London was destroyed by article 43 thereof. Let me now consider this point. Article 65 of the Declaration of London requires that the provisions thereof should be treated as a whole. The Declaration has been adopted by our Sovereign by an Order in Council, subject to certain modifications which do not affect the present case. Article 57 comes under chapter 6, headed "Enemy Character," whilst article 43 is one of those included in chapter 2 headed "Contraband of War." A comparison with the other articles shews that articles 22 to 44 deal with contraband. Article 37 makes a vessel carrying contraband goods liable to capture. Article 40 makes such a vessel liable to condemnation if the contraband forms more than half the cargo. By article 41, if a vessel carrying contraband is released she may be condemned to pay the captor's costs and expenses. Article 43, or so much of it as concerns this matter, reads: "If a vessel is encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband which applies to her cargo, the contraband cannot be condemned except on payment of compensation; the vessel herself and the remainder of the cargo are not liable to condemnation or to the costs and expenses referred to in article 41. The same rules apply if the master, not becoming aware of the outbreak of hostilities or of the declaration of contraband, has had no opportunity of discharging

the contraband." Article 43, I am convinced, applies to ships "other than enemy vessels" having contraband on board. The first paragraph of article 57 reads: "Subject to the provisions respecting transfer to another flag, the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly." The general report of the Naval Conference, held in London in 1909, is instructive on this point.

In the case of *THE VROW ELIZABETH* [1803] (5 C. Rob. 4; 1 Eng. P.C. 409), Sir William Scott (Lord Stowell), in 1803, in his judgment, said: ". . . a vessel sailing under the colours and pass of a nation is to be considered as clothed with the national character of that country. With goods it may be otherwise, but ships have a peculiar character impressed upon them by the special nature of their documents, and have always been held to the character with which they are so invested, to the exclusion of any claim of interest that persons living in neutral countries may actually have in them." It is true that in the same judgment he went on to say: "When I lay down this rule I do not say that there may not be cases of such particular circumstances as to raise a reasonable distinction. The Treaty of Amiens had stipulated for the liberty of withdrawing British property from the ceded and restored islands. But the Governments of France and Holland afterwards refused to suffer such property to be exported from these Colonies otherwise than in ships of France or Holland, and on a destination to those countries. The difficulty which had arisen in the removal of British property for want of shipping may have induced our own Government to permit British ships to put themselves under Dutch flags for this particular purpose; and in such cases the particular situation of affairs arising out of this refusal to execute a treaty may have entitled parties to a relaxation of the general rule. But no ground of exemption whatever is stated in the present claim—nothing more than that the claimant found it convenient to place his vessel under the Dutch character; to which the answer is obvious, that with the convenience he must take also inconvenience attending such an act. . . . This ship has all the documents of a Dutch ship, and I have no hesitation in pronouncing her subject to condemnation."

The learned Dr. Lushington in *THE INDUSTRIE* [1854] (Spinks, 54; 2 Eng. P.C. 297) remarked as follows: "What would become of belligerent rights if, when you search vessels

under hostile colours, you are to be told 'this is not a Russian vessel; it is neutral, or nine-tenths is neutral. You are quite mistaken; it is entitled to restitution at the hands of the Court.' It is manifest that the right of search under these circumstances would be destroyed. It is clear that the whole trade of an enemy might be carried on with perfect impunity, and all the naval force of France and Great Britain would never be able to carry into execution those rights which they are undoubtedly justified in exercising by the Law of Nations." He added that in that case he entertained no doubt, and condemned the vessel.

The same learned Judge, in giving judgment in *THE PRIMUS* [1854] (Spinks, 48; 2 Eng. P.C. 291), said: "There are two questions to be disposed of in this case: the one regarding certain claims for a share in the ship and the other relating to the cargo. The first is a pure question of law, whether the persons who now claim, and who are admitted, for the purpose of argument, to be neutral subjects, are entitled to have the ship restored. On the part of the Crown it has been contended that the flag and the pass are binding upon all persons having property or shares in the ship. In support of this principle, authorities have been brought before the Court which must govern it in this and all similar cases. The only distinction attempted to be established in the present case is that this is property in the vessel belonging to neutral subjects, which existed antecedent to the breaking out of the war. It has been urged" (continued Dr. Lushington) "that I ought to take notice of that distinction, but I apprehend that not only the authority of Lord Stowell, but every argument he used, go the whole length of saying, that whoever embarks his property in shares of a ship is bound by the character of that ship, whatever it may happen to be. If he reap the benefit accruing during peace, he must also take the consequence of war."

The Attorney-General, in his argument, submitted that he was entitled to claim condemnation, although at the present time he was not asking for an order of sale. He argued that on a true construction of the Prize Courts (Procedure) Act, 1914, section 20 of the Naval Prize Act of 1864 was (for the purpose of this case) in full force and effect, and that thereunder the Court was required either to condemn or release the captured ship.

Counsel for the claimants, on the other hand, submitted that the Court should decline to order condemnation, and should

instead order a detention of the ship. He argued that section 20 of the Naval Prize Act of 1864 had been repealed by the Prize Courts (Procedure) Act, 1914, and that inasmuch as the new Prize Court Rules of 1914 came into force in this Colony on September 3 last, the Court should have regard to Order XXVIII. rule 1 thereof (notwithstanding its direction that this case should be continued under the Rules of 1898). Order XXVIII. rule 1 of the Rules of 1914, reads: "Where it is held in a suit for condemnation that the ship is an enemy ship, but in pursuance of some international convention, or otherwise, is only liable to detention and not to condemnation, the decree shall direct the marshal to retain the ship in his custody until further orders." Pressed as to what international convention or otherwise he relied on, counsel said he relied on the third article of the Sixth Hague Convention, and on article 6 of the Order in Council of August 4, 1914 (promulgated in this Colony on August 5). He quoted the recent case of *THE TOMMI AND THE ROTHERSAND* (*ante*, p. 16; [1914] P. 251), and referred to that of *THE R. C. RICHMERS* (Times, Sept. 25, 1914).

The question of whether and how far the provisions of the Hague Convention of 1907 are binding on a British Prize Court is one which I believe has not yet been decided. But it is unnecessary to have regard to this Convention in this case, as, if it applied, the article which would have to operate would be article 3, and as to that Germany has not agreed. So no benefit can possibly be given under it. Order 6 of the Order in Council of August 4, 1914, has reference only to enemy merchant ships which, first, at the date of the outbreak of war were in any port in which the Order applied, or which, secondly, cleared from their last port before the declaration of war, and after the outbreak of hostilities entered a port to which the Order applied with no knowledge of the war. The cases of *THE TOMMI AND THE ROTHERSAND* (*ante*, p. 16; [1914] P. 251) and *THE R. C. RICHMERS* (Times, Sept. 25, 1914) were all cases of vessels which had been captured in port. The vessel in the present instance was taken, as pointed out already, at sea on August 8, and among her ship's papers is a German wireless certificate.

I am clearly of opinion that section 20 of the Naval Prize Act, 1864, is in force for the purpose of this case, and that the Rules of 1914 are not applicable, the Court having elected to proceed

under the previous Rules; and further, that the *Leda* is undoubtedly a German vessel under a German master, with a crew mostly composed of Germans, and flying the German flag. Were the claimants even the actual shareholders, it appears to me the property must go with the capture of the vessel in which they have put their money. Assuming that the claimants had property in this vessel, or were the owners of the whole or any part of the vessel, the fact that the ship was sailing when captured under the German flag, with papers entitling her to do so, and was in the commerce of the German Empire, and navigated by a German master, would be fatal to their claim. This point I believe to have been decided in the recent case of *THE MARIE GLAESER* (*ante*, p. 38; [1914] P. 218), heard in the Admiralty Division of the High Court of Justice in England.

I have no hesitation in ordering the condemnation of this vessel.

INGHAM, J., and BLUCK, J., concurred.

*Decree of condemnation.*

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[IN H.B.M. PRIZE COURT FOR EGYPT.]

(*Sitting at Alexandria.*)

CATOR, P., and GRAIN, J. Feb. 6, 1915.

### THE ACHAIA.

*Enemy Ship—Outbreak of War—Discharging in Belligerent Port—Offer of Safe-conduct Pass—Form of Pass—Refusal to Leave—Subsequent Detention—Hague Conference, 1907, Convention VI. arts. 1, 2.*

*An enemy vessel, lying in a belligerent port at the outbreak of war, which fails to take advantage of permission to leave, accompanied by an adequate safe-conduct pass to a neutral port, is liable to condemnation.*

Suit for condemnation of an enemy vessel as prize.

The *Achaia*, a German steamship of 2,732 tons, came into the port of Alexandria on July 31, 1914, to discharge a portion of

her cargo. When war broke out between Great Britain and Germany, the detaining officer appointed by the general officer commanding the troops in Egypt offered her a safe-conduct pass to a neutral port with permission to leave at any time before sunset on August 14. She declined to go, and after the days of grace had expired she was detained by the Egyptian authorities, and on October 17 finally seized as prize by an officer from H.M.S. *Warrior*.

*Arthur Preston (H.M. Procurator-General), for the Crown.*

*G. A. W. Booth, for the claimants, the owners of the Achaia.*

CATOR, P.—My brother deals so fully with the facts in the judgment which he is about to read that I will not recapitulate them.

On the outbreak of hostilities the *Achaia* was in Alexandria, and under the old rule was liable to confiscation; but article 1 of the Sixth Hague Convention declares it to be desirable that an enemy ship found in a hostile port at the outbreak of war should be allowed to depart freely, either immediately, or after (which I think must mean “within”) a sufficient term of grace, and to proceed direct after being furnished with a passport (in the French a *laissez-passer*) to its port of destination or such other port as shall be named for it. And article 2 says that ships which are not allowed to proceed under the terms of article 1 cannot be confiscated. The intention is clear that if they get a pass, by which of course is to be understood an adequate pass, and decline to make use of it, the old law will still apply. No one has disputed that proposition, but the owners contend that the pass offered in this case was inadequate.

It is perfectly clear that Grogan Bey, the Chief Inspector of Ports, was authorised by the Government to give the *Achaia* a pass. Counsel could do no more than try to pick holes in its form, to complain that the time allowed was very short, and to contend that it was the business of the authorities to get the pass *viséd* by the French Consul. Without discussing these points in detail, I have only to say that, in my opinion, the form, although framed for use in a British port, was quite adequate for its purpose; that the time was sufficient, and would have been extended had there been any necessity; and that there was no obligation on the Government to obtain a *visé* from a French

authority, inasmuch as I think we have the right to suppose that a French Prize Court would respect a safe conduct granted by its allies. The cases of *THE HOPE* [1813] (1 Dods. 226; 2 Eng. P.C. 153) and *THE REWARD* (reported in a note to *THE HOPE*, in 2 Eng. P.C. 155) merely affirm the fact that in law the validity of a pass or licence depends upon whether the person giving it is duly authorised to do so or not.

The conditions laid down in article 1 of the Sixth Hague Convention were fully complied with. The *Achaia* was offered an adequate pass to a neutral port, and declined to avail herself of it. She has no defence against the claim of the Crown for confiscation, and in accordance with the request of the Procurator we order her delivery to the proper officer.

GRAIN, J.—The s.s. *Achaia* is a vessel belonging to the Deutsche Levante Linie of Hamburg, a German steamship company, her tonnage being 2,732.

She left Bremen on July 15, 1914, with general cargo for Alexandria and Syrian ports, and arrived at Alexandria on July 31, when the unloading of her cargo for that port was commenced.

According to the log, on August 3 the mobilisation of Germany was announced to the master of the vessel by the German Consul, and several seamen were sent off to Germany to do their military service. On August 4 the log states that orders were received from the German Consulate not to leave the harbour.

Grogan Bey, Lieut. R.N., Chief Inspector of the Marine of the Egyptian Ports and Lights, and detaining officer appointed by General Byng, the officer commanding the troops in Egypt, states in his affidavit and in his evidence given before us that the s.s. *Achaia* was lying in Alexandria harbour at the outbreak of war on August 4, and that on August 7, acting under articles 7 and 8 of the Egyptian *Décision*, and with a view to examining whether any goods destined for German ports or contraband were on board, he caused her cargo to be discharged on the quay. As soon as the war broke out, or a few days after, a pass of safe conduct was offered to the master of the vessel with permission to leave up to sunset on August 14.

The pass was in the following form:

“Form for pass to be issued to enemy merchant ships allowed to leave British ports under favour of ‘days of grace.’



" Issued under articles 7 and 8 of the Order of His Majesty in Council, dated the.....day of.....190.....with respect to 'days of grace' for enemy merchant ships.

" The (a).....of (b).....whereof (c).....is master, is allowed to proceed from (d).....to (e).....During such voyage she will be exempt from capture on the ground that she is an enemy ship, provided that she has on board no cargo of a contraband nature, that she clears from (d).....before midnight on (f).....and proceeds without delay to (e).....by the route indicated below, and does not call at any port, liberty to call at which is not there given. Provided also that she keeps her colours constantly flying during her voyage, and makes no attempt to evade stoppage and search by British ships of war which she may fall in with. Breach of any of these conditions will render the pass void and the vessel liable to capture.

(g) .....

Route (h) .....

Ports at which the vessel may call (i) .....

[Here follow (a) to (i), instructions for the filling in of the pass, (g) stating that "the Customs officer issuing the pass should sign here, inserting his rank and post."]

The port of destination was to be Piræus, and Grogan Bey was to sign it as detaining officer appointed by General Byng.

The form of pass was shewn and explained not only to the master of the vessel, but also to the agent of the line.

Grogan Bey states that he thinks that on August 6 he told the agent of the line, Max Stross, that if they stayed they would be liable to capture, and is certain that he informed him that if they stayed beyond August 14 they would be so liable. On August 13 he thought that they were about to leave, and granted authority for sufficient coal and water to be delivered to the vessel to carry her to Piræus.

Max Stross, in his evidence, states that he does not remember Grogan Bey telling him that the vessel would be liable to capture if she remained, his impression being that when he asked the question Grogan Bey had replied that he did not know what would happen, and that he, Grogan Bey, had enquired by telephone of the British Agency, and that they also had said that they could not say what would happen to the vessel if she remained after August 14. Max Stross also states that on August 13 he was sent for by Grogan Bey and definitely offered

a pass for the vessel, Grogan Bey shewing him the form and stating that he would sign it as detaining officer appointed by General Byng, and that the port to be inserted would be Piræus. The agent asked Grogan Bey "if it would be useful for French ships as well as British," and was informed that he must enquire at the French Consulate as to that. Consequently the agent of the line went to the French Consul, but the French Consul told him that he had no authority or instructions to countersign.

The agent also asked the British Consul-General to put his seal on it, but was again informed that no authority or instructions had been given to countersign passes, although the Consul-General offered to certify that the signature to the pass was a genuine one. Therefore, he states that he came to the conclusion that because he could not get it *viséd* by the French Consul, nor get any other official seal on it, it would not be an effective pass, and he informed the port authorities that the vessel would remain in Alexandria Harbour.

Grogan Bey states he was quite prepared to give the agent further time to obtain the *visé* from the French Consulate if he had asked for it, and, in fact, the master of the s.s. *Emil* did ask for further time on account of being in difficulty as to labour, and further time was granted. With regard to the effectiveness of the passes, Grogan Bey states in his evidence that he gave three other ships passes on forms identical with those shewn and offered to the master and agent of the *Achaia*, one to an Austrian ship named the *Marienbad*, by order of the British Admiralty through the British Agency, and two on his own account in the ordinary course of his duty. The *Marienbad* pass was filled in with the port of Patras, and the other two with Piræus.

In all these cases the pass was effective, and the ships duly arrived safely in the ports named. One was stopped outside Piræus by a British man-of-war, but was allowed to proceed. Grogan Bey also states that, as a British naval officer, he considers that any captain of a British warship would have accepted the pass in the form in which it was offered to the master and owners of this vessel.

The Procurator in this case asks for an order for condemnation and delivery to the Crown on the ground that every opportunity was given to the vessel to leave and to proceed in

safety to a neutral port, but as she refused to do so she has rendered herself liable to confiscation.

Counsel on behalf of the owners urges that the pass was inadequate and ineffective; that the agent and master had reason to consider that Alexandria was a neutral port; and that the authorities should have given them definite information as to the *status* of the port. He argues that under the case of *THE HOPE* (1 Dods. 226; 2 Eng. P.C. 153), and the notes to that case concerning the case of *THE REWARD* (2 Eng. P.C. 155), that the pass offered in this case was not an effective pass, as the officer of the Government signing had not the requisite authority to sign, and that the pass not being an effective one the Court ought not to come to the conclusion that this vessel was liable to confiscation.

I am of opinion on the facts placed before me that the pass was an adequate and effective pass, and such as would have carried her safely to the port of Piræus, and that everything that was necessary to be done in compliance with the Hague Convention No. VI. article 1 was done. Consequently, having refused to take advantage of this safe conduct which was offered to her, and chosen instead to remain in an Egyptian port, which we have already found is not a neutral port, she became liable to be seized as good and lawful prize, and was after August 14 detained as such by Grogan Bey under his authority as detaining officer, and was finally seized on October 17, 1914, by Lieut. Fenner, R.N., of H.M.S. *Warrior*.

I therefore concur in the order made that this ship shall be confiscated and delivered to the Crown.<sup>1</sup>

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(1) See note, *ante*, p. 122.

[IN H.B.M. PRIZE COURT FOR EGYPT.]

(Sitting at Alexandria.)

CATOR, P., and GRAIN, J. Feb. 17, 1915.

### THE PINDOS.

*Enemy Vessel—In Belligerent Port at Outbreak of War—Offer of Safe Conduct—Failure to Use—Erroneous Representation as to Neutrality of Port—Renewed Offer of Safe Conduct—Seizure in Port.*

*An enemy vessel, lying at Port Said at the outbreak of hostilities, was offered a safe conduct to a neutral port available for ten days, but she did not use it. On the expiration of the time limit no steps were taken against her, and instructions as to the user of the port were issued, indicating that the Egyptian Government intended to treat Port Said as a neutral harbour. Subsequently the offer of a safe conduct was renewed, but the vessel continued to remain, using the port as a port of refuge for about eight weeks, when she was seized as prize:—Held, that as the vessel had failed to take advantage of the first offer of a safe conduct, when no suggestion as to the neutrality of the port had been made, she was liable to condemnation.*

Cause for condemnation of ship as prize.

The *Pindos*, a German steamship, 2,933 tons gross, belonging to the Deutsche Levante Linie, of Hamburg, whilst on a voyage from Antwerp to Syrian ports, arrived at Port Said on August 1, 1914. On the outbreak of war between Great Britain and Germany she was offered a safe conduct to Beyrout, available until sunset on August 14, but did not make use of it.

On August 13 the detaining officer of the port informed the German Consul that all the German vessels lying in the port, except those which left under their safe conduct, would be detained; but on the 14th the detaining officer received instructions that all merchant vessels of the belligerent Powers would be allowed free transit and clearance, and that if they desired to remain they could do so.

No steps were taken against the *Pindos*, but a second safe conduct was made out for her on August 22, available until

August 29. She declined to use it, and remained, using the port as a port of refuge, until October 15, when a British captain was put on board, and the master was told that his vessel had been taken over by the Egyptian Government. She was then taken out to sea, handed over to H.M.S. *Warrior*, and brought in to Alexandria as prize.

*Arthur Preston (H.M. Procurator-General in Egypt), for the Crown.*

*G. A. W. Booth, for the claimants.*

CATOR, P.—On the outbreak of hostilities the *Pindos*, a German ship of 2,933 tons, was lying in Port Said. She was offered a safe conduct to a neutral port, but declined to take it. Counsel contends that the safe conduct was inadequate, but in form it was identical with that offered to the *Achaia*, which we have already held to be good. It was signed by Captain Trelawny, the captain of the port and detaining officer in Port Said, who was the proper person to give it, and in this respect we cannot distinguish the case of the *Pindos* from that of THE *ACHAIA* (*ante*, p. 242).

As an alternative line of defence, counsel for the claimants put forward the plea that on general grounds of equity he has a claim to relief. He pressed upon us the view that the master believed Port Said would be treated as a neutral port, that the action of the Egyptian authorities contributed to such belief, and that under these circumstances it would be inequitable to confiscate the ship. So far as I can recollect he did not charge the Government with an actual breach of faith, but he went almost as far, and indeed, if he is to succeed, I think that is what he must prove. He must shew that the master declined a safe conduct, and elected to stay in consequence of representations made to him by the Government that if he remained he would not be molested; and if that were proved, I have no doubt that the *Pindos* would be entitled to the same order as in THE *BARENFELS* (*ante*, p. 122).

There certainly must have been great uncertainty in the minds of all parties, the Government included, as to the actual *status* of the Canal ports. The question as to their neutrality was, as Captain Trelawny said, "in the air." He himself thought that they were neutral, but he denies that he ever declared them to

be so, and the utmost that he could be got to admit was that he may have acquiesced in such a statement when made to him.

Briefly the facts are as follows: The Government issued a proclamation on August 6 declaring how it would deal with enemy ships in Egyptian harbours. Special concessions were granted to ships in Canal ports, provided that such ports were only used for a normal period in connection with Canal transit, but the *Pindos* had merely touched at Port Said on her Mediterranean tour, and under no circumstances would have passed through the Canal. In common with all the other German vessels, she only used Port Said as a harbour of refuge, and consequently, as this Court has already determined in *THE GUTENFELS* (*ante*, p. 102), can claim no benefit under the Canal Convention. We have only to consider her case as that of an enemy ship in an Egyptian port.

Under the proclamation ships under 5,000 tons were free to leave up till sunset on August 14. Nothing was said about safe conducts, but on August 5 safe conducts were in fact offered to the *Pindos*, the *Rostock*, and the *Helgoland*, which were good up to sunset on the 14th, after which they were withdrawn. Captain Trelawny had orders to detain all enemy ships in harbour on the evening of August 14, and on the 13th he had an interview with Mr. Rickmers, the German Consul, and made it clear that all ships except such as might leave under safe conduct would be seized on the following day. But in the course of the next morning he received fresh instructions, which he committed to writing in the following terms:

"The result of conversation with Mr. Ward Boyes, Ministry of Interior, regarding detention of German and Austrian vessels at Port Said: All merchant vessels of the belligerent Powers may be allowed free transit and clearance from the port under the conditions laid down in par. 20 of the Proclamation—*Journal Officiel*, 6th August. If they desire to remain they are at liberty to do so, qualified by text of same article. They may tranship cargo in part or in whole to any vessel under a neutral flag. Said vessel however being liable to overhaul and capture if contraband of war is found on board."

The substance of these orders was communicated to Mr. Rickmers, who was agent for a good many of the ships, and at whose house the masters assembled daily to hear and discuss the news of the day.

On August 22, for reasons with which the Court is not acquainted, fresh safe conducts were made out and offered to the three ships already mentioned, available up to August 29, but the ships declined to take them, and there is no reference to this offer in any of their logs.

If the authorities had adhered strictly to the terms of the proclamation they would have been quite entitled to seize the *Pindos* at sunset on August 14, and she would have had no better claim for consideration than the *Achaia* and other ships in Alexandria; but the Government undoubtedly complicated matters by issuing its later instructions, and it becomes important to ascertain what exactly were the intentions of the *Pindos*, and how far, if at all, they were modified by the Government's change of policy. Had the *Pindos* been preparing to leave on the 14th, but changed her mind in consequence of any representations made by Captain Trelawny, I think she would have good ground for relief. This Court would certainly not confiscate any ship that had acted in reliance on a promise made by the authorities. But if the master had determined not to use the safe conduct that had been proffered to him, it matters not what declaration the Government may have made at a time when it had become too late for the master to take any consequential action; and as it appears from the log that no order had been given to get up steam before noon on the 14th, it is evident that he had no intention of leaving on that day.

I have taken the trouble to examine in detail the logs of the *Pindos*, the *Rostock*, and the *Helgoland*. There is not the smallest hint that a single one of them ever had any intention of putting to sea between the dates of their arrival and August 14.

The entry in the log of the *Pindos* on the 14th is as follows: "Fine weather. Bilge empty. Did ship's work. At night one man on watch. The port of Port Said was declared neutral."

I am quite satisfied that the *Pindos* never intended to leave the harbour, and that the master's actions prior to August 15 were not affected in the smallest degree by any declaration that may have been made by the port officer.

After the 14th the position was materially altered, and I think that the Government can found no claim on the offer of a safe conduct made on August 22, for by that time it had given unequivocal signs that it intended to treat Port Said as neutral. The position of the Canal ports in International Law had not then

been ascertained by any judicial decision, and I think we may conclude that the authorities were doubtful as to their rights, and were particularly anxious to avoid taking any step which might amount to an infraction of the Canal Convention. But, be that as it may, the Government had intimated to the masters and agents that all German ships except the *Derfflinger*, which apparently was only placed in a separate category because it had committed what was deemed to be an unneutral act in the Canal, were at liberty to leave, and were free to dispose of their cargoes or to tranship them into neutral bottoms, and on the expiration of their days of grace it had abstained from all action against the *Pindos* itself and the other ships to which safe conducts had been given. Short of a formal public declaration, I think the Government could have taken no more effective steps than these to announce to the world that it intended to treat Port Said as a neutral harbour, and the *Pindos* then had every right to consider that she would not be molested if she stayed there. Under these conditions, the mere offer of a fresh safe conduct, unaccompanied by any intimation that, on the expiration of the new term of grace she would be seized as a prize, was, in my opinion, insufficient to justify a claim for confiscation.

The Procurator must be content to rest his case upon the first offer and its rejection. There he is on safe ground, and entitled to succeed for the reasons which I have stated.

There will be an order for confiscation of the *Pindos*, and her delivery to the Crown.

GRAIN, J.—The s.s. *Pindos* is a vessel of 2,933 tons, belonging to the Deutsche Levante Linie, of Hamburg. She left Alexandria on July 31, 1914, and arrived at Port Said on August 1. Her voyage was from Antwerp to Syrian ports, *via* Alexandria and Port Said. She had therefore no intention of passing through the Canal.

The master, George Starke, a German master mariner, states in his affidavit that on his arrival at Port Said on August 1 he received orders not to proceed until further instructions. He does not state from whom he received these orders, but presumably from the agent of the Deutsche Levante Linie at Port Said. The officer of the port, Captain Trelawny, states in his affidavit that on the outbreak of war she was offered a free pass, but that that offer was withdrawn on August 14, though her master was



informed that she was still free to leave the port. The master, in his affidavit, also states that he was told by his agents, after he had been in port a few days, that he would receive a free pass, and he further states that on August 14 the port captain came on board and said that the vessel was allowed to leave the harbour, and the master was to call for a pass at 4 P.M. that afternoon. The master states that he did not call for the pass on that day because he was told that the port was a neutral one, but that on August 22 he did receive a free pass. This pass was to the port of Beyrout, and was *viséd* by the French Consul, and gave permission to leave the harbour up to midnight of August 29.

The agent of the German steamship line, and the master of the vessel, appear not to have been satisfied with this pass, and elected to stay in Port Said harbour. Consequently, on August 30 the pass was withdrawn. On October 15 she steamed out of Port Said with a British captain in charge of the ship, and an Egyptian officer and some soldiers on board, the master being told that the ship had been taken over by the Egyptian Government. When about five miles out from the port she met H.M.S. *Warrior*, and a British naval officer came on board with some British sailors and the ship was steamed to Alexandria, where she arrived on October 16, and was duly taken over by the Marshal of H.B.M. Prize Court.

It is urged on behalf of the Crown that in this case everything that was necessary and possible to be done under the Hague Convention, and the *Décision* of the Egyptian Government was done; that if the master and agent chose to think that the passes given were not sufficient, and therefore elected to remain in the harbour, relying upon its being considered a neutral port, that they must take the consequences if they now find that it is not considered a neutral one.

By counsel on behalf of the owners it is urged that a declaration of some sort was made to the master that Port Said was a neutral port, and that the master had a right to rely on Port Said being considered a neutral port; that the pass was not a good pass, and not sufficient to protect her if she had left the port; that the passes were headed, "Ships leaving British ports," and signed by an Egyptian official, and therefore, on the face of them, they were inefficient; that the pass was not one issued under an Order in Council, or in any way authorised by High Sovereignty, nor was it signed by any one authorised with a British commission to do so;

and *THE HOPE* [1813] (1 Dods. 226; 2 Eng. P.C. 153, and the note to that case on p. 155) was cited. For all or any of these reasons it is contended that it was a bad pass, and would not be sufficient to protect the vessel had she proceeded on her voyage. The preamble of the Hague Convention is also prayed in aid—namely, the phrase “Anxious to ensure the security of international commerce against the surprises in war, &c.,” and it is urged that in equity this vessel should only be detained and not confiscated, as she remained in Port Said under the impression that it was a neutral port, and that some one, and some one in authority, gave the master and agent of this ship to understand that Port Said was a neutral port, and would be considered by the Government to be neutral; and it is contended that in consequence of this intimation the vessel remained in the harbour instead of making use of the pass of free conduct.

The form of pass in this case is identical with that used at Alexandria in the case of *THE ACHAIA* (*ante*, p. 242), except that the port named, to which the vessel was to proceed, was Beyrout instead of Piræus, and the pass was to be signed by Captain Trelawny, port officer of the Egyptian Government, who was acting as detaining officer. In this case, Captain Trelawny arranged with the French Consulate that the French Consul would *visé* the passes on application.

The question of these passes has been fully dealt with in the judgment of the case of *THE ACHAIA* (*ante*, p. 242), and as the facts and circumstances as regards them are the same, there is no need to deal further with them here, beyond saying that in my opinion the pass received by the master and agent of this ship was an effective pass of safe conduct from the responsible port authority at Port Said, and would have been ample protection to the vessel if she had proceeded to the port named on the pass—namely, Beyrout.

We now come to the question, Was the master and agent of this vessel informed by some one in authority at Port Said that it was a neutral port, and that if the vessel remained there it would be free from capture? And, if so, did this information induce this vessel to remain at Port Said? It is somewhat difficult, from the evidence of Captain Trelawny, to understand exactly what information he did give the master and agent of this vessel. But the following facts are clear:

From August 6 to August 14 the *Pindos* was free to leave on obtaining a pass of free conduct from Captain Trelawny. Captain

Trelawny states that on August 5 he "offered them safe conducts, and told them they would be provided with passes. This was withdrawn on August 14. On August 13 notified German Consul that *Pindos* could proceed. Arrangements made to come to this office at 4 P.M. for pass. On August 14 warned *Pindos's* master to prepare to leave the port before sunset." The offer of a pass was withdrawn on August 14, but a pass was again offered on August 22, and on that date was actually given to the *Pindos*, signed and stamped by Captain Trelawny, who also made arrangements with the French Consul to *viser* on application. This pass was valid up to August 29.

Therefore, it is clear that from August 5 to August 14, and from August 22 to August 29, this vessel was free to leave the port with a safe conduct to Beyrout *viséd* by the French Consul. With regard to the information that Captain Trelawny gave as to the neutrality of the port, the evidence is not so clear.

He states: "I cannot say that 'neutrality' was used; the word 'neutrality' was in the air and I may have used it. My impression at the time was that Port Said was a neutral port."

Although in these statements of Captain Trelawny there is no evidence that he directly or officially stated that the port was neutral, nevertheless his mind appears to have been so imbued with the idea of neutrality of the port that one cannot abstain from thinking that in all probability he must, in his communications with the master and agent, have left that impression on their minds.

Was this the cause of the master and agent deciding to remain in Port Said? Did they rely on any intimation from Captain Trelawny that if they did so they would be free from capture?

The only means we have of arriving at the intentions of the various masters of German vessels is by consulting the entries in their official logs, written day by day, and the sworn affidavit of the masters. It appears also from the evidence that the masters of the German vessels were accustomed, during the first weeks of the war, to assemble daily at the German Consulate at Port Said, and there discuss their circumstances and positions. Therefore, by consulting the various logs, one is able to arrive at some idea of their general views and intentions.

The log of the *Pindos* does not give much information beyond the fact that the ship was engaged in unloading cargo between August 1 and August 14, and shewed no intention of leaving the

port. The log of the s.s. *Rostock*, a ship in the same circumstances as the *Pindos*, contains the entry on August 1, the day of her arrival at Port Said, "In order to protect ship and cargo from attacks of the enemy, shall remain until further notice in Port Said as the harbour is neutral." On August 5, in the log of the s.s. *Lutzow*, it is stated that the master had "received notice from Consulate (German) that the ship was not to return to Germany until further notice." On August 2, in the *Rabenfels's* log, is the entry, "As there is danger of war am kept fast in harbour." And in the affidavit of the master of the s.s. *Helgoland* is the passage, "The safe conduct offered me was, I realised, no real protection from capture, and moreover constituted in itself as signed by the captain of the port no sufficient authority to permit of my proceeding out of the harbour."

It also appears that the masters of all these ships, as soon as they got news of the mobilisation of German troops, which in some cases was before August 4, sent all the men of their crews who were of military age back to Germany, and, consequently, were more or less without crews.

I am of opinion that, although there certainly does seem to have been a general impression on August 14 that the port had been declared neutral on that date, nevertheless, long before this, the ship in question and the other German ships in port, had made up their minds to take refuge in Port Said, and I am of opinion that nothing that may have been said or suggested by Captain Trelawny as to the neutrality of the port in any way affected their minds on this point. It appears that, doubting the effectiveness of the safe conducts offered them, they preferred to run any risks there might be in remaining in port rather than trust to the safe conducts.

We have already found that Port Said is not a neutral port, and that under the Suez Convention the ships of belligerents have no right to make it a port of refuge.

I therefore agree with the judgment of the President of this Court that this ship has been properly seized as good and lawful prize, and concur in the order made by him.<sup>1</sup>

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(1) See note, *ante*, p. 122.

[IN H.B.M. PRIZE COURT FOR EGYPT.]

(Sitting at Alexandria.)

CATOR, P., and GRAIN, J. Feb. 19, 1915.

### THE EMIL.

*Enemy Ship—British Mortgagees—Validity of Claim—Right to Appear and Argue against Condemnation of Vessel.*

*British mortgagees of an enemy vessel cannot have their charge enforced by the Prize Court, but where the owners do not appear the mortgagees may be heard in the Prize Court to argue against the condemnation of the vessel.*

Claim for condemnation of ship as prize.

The German steamship *Emil*, 2,991 tons gross, which at the outbreak of war between Great Britain and Germany was in the port of Alexandria, was offered a safe conduct to a neutral port, but did not avail herself of it, and she was seized as prize.

The owners did not appear, but an appearance was entered on behalf of a British firm as mortgagees of the *Emil*, and it was contended that their charge should be secured to them, and, if that plea failed, that they should be allowed to argue against the condemnation of the vessel.

*Arthur Preston (H.M. Procurator-General), for the Crown.*

*G. A. W. Booth, for the claimants.*

The judgment of the Court was delivered by

CATOR, P.—The claimant in this case is the mortgagee of the *Emil*, a German ship, which at the outbreak of hostilities lay in Alexandria Harbour. She was offered a safe conduct to a neutral port, but declined to avail herself of it, and her case cannot be distinguished from that of *THE ACHAIA* (*ante*, p. 242), which we condemned last week. The mortgagee asks that his interest may be secured to him, or, if that plea fails, that he may be allowed to be heard against the condemnation of the ship. We have great sympathy with British subjects holding *bona fide* mortgages, but it is now settled beyond the reach of argument that no person holding a mortgage, bottomry bond,

or any other charge can set up any separate interest from his mortgagor so as to defeat the claim of the Crown to condemnation. The general law has been reviewed at length by the Court of Admiralty in England in the recent case of *THE MARIE GLAESER* (*ante*, p. 38; [1914] P. 218), and the President left no more to be said on the subject. The fact that the mortgagee of the *Marie Glaeser* was a Dutch company, whereas that of the *Emil* is a British firm, makes no difference. The rule rests on a solid foundation. Without it the Crown could scarcely hope to procure condemnation of any prize, for, were it otherwise, on the faintest whisper of hostilities shipowners would hasten to mortgage their property to subjects of neutral Powers. The reason is admirably stated by the Supreme Court of the United States in the case of *THE HAMPTON* [1866] (5 Wall. 372), which is quoted in *THE MARIE GLAESER* (*ante*, p. 38; [1914] P. 218). It is a good and sufficient ground, and we are not prepared to admit that any other exists, for the determination of foreign law should not present more difficulty to a Prize Court than to any other English Court, and it may very well be that under modern conditions a Prize Court may be forced to consider the validity of foreign charges. What, for instance, is to prevent a British mortgagee of a ship detained under the provisions of the Hague Convention from asking the Court to sell the ship and satisfy his claim out of the proceeds?

It has been suggested that this Court might exercise what is called the bounty of the Crown in favour of these British mortgagees, but that is impossible. The Crown has always listened favourably to the complaints of British subjects who suffer hardship by reason of the strict enforcement of the rule, and it would seem that Lord Stowell sometimes himself exercised the Crown's bounty as Judge of the Prize Court, and ascertained the sum to be paid by enquiry in chambers—*THE BELVIDERE* [1813] (1 Dods. 183; 2 Eng. P.C. 183). But this practice has not been continued, and I think it must be admitted that if such jurisdiction ever existed it has fallen into desuetude and cannot be revived without legislative authority. The Government has recently created an informal Court to deal with such claims, and to that tribunal the mortgagees of the *Emil* can apply.

Another point raised by counsel for the claimants relates to the *locus standi* of the mortgagee in regard to the question of capture. Has he a right to say that the capture was bad when the mortgagor

does not appear? I think upon general principles of equity that in such a case the mortgagee has a sufficient interest in the subject-matter to justify his appearance. It might very well happen that the value of the charge exceeded that of the security, and that the mortgagor might be indifferent whether the ship were confiscated or detained, whereas the mortgagee would have every interest in obtaining an order for detention with a view perhaps to a sale and deposit of the proceeds in Court as security for his charge. We allow the claimant's appearance and right to appeal against the condemnation of the ship.<sup>1</sup>

(1) See note, *ante*, p. 122.

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[IN H.B.M. PRIZE COURT FOR EGYPT.]

(*Sitting at Alexandria.*)

GRAIN, J. March 17, 1915.

### THE MARIA.

*Enemy Ship—Seizure in Port—Small Coasting Vessel Engaged in Local Trade—Vessels Exempted from Capture—Hague Conference, 1907, Conventions VI. and XI. (art. 3)—Failure of Turkey to Ratify.*

*There is no customary rule of International Law, apart from Convention, protecting from capture small coasting vessels engaged in general local trade. The customary immunity from capture applies only to fishing vessels.*

Claim for condemnation of the Turkish sailing ship *Maria*, a vessel of twenty-seven tons engaged in general coasting trade, which was seized at Alexandria shortly after the outbreak of war between Great Britain and Turkey on November 5, 1914.

*Arthur Preston (H.M. Procurator-General), for the Crown.*—There should be an order of confiscation, as the *Maria* was an enemy ship lawfully captured as prize of war. The Hague Convention of 1907 has not been ratified by Turkey, and the owner has no defence under any of its provisions.

A. *Alexander*, for the master and owner.—It is admitted that the Hague Convention does not apply, but the rule embodied in article 3 of Convention No. XI., which lays down that “vessels employed exclusively in coast fisheries or small boats employed in local trade are exempt from capture,” had already become a practice and rule of law before the Convention was signed—see *THE BERLIN* (*ante*, p. 29; [1914] P. 265) and *THE PAQUETE HABANA*; *THE LOLA* [1900] (175 U.S. 677; 189 U.S. 453; *Scott's Cases on International Law*, p. 19). Although in both cases the vessel in question was a fishing boat, nevertheless the same principle applies to small vessels engaged in coasting trade, and there should be an order for detention and restoration after the war.

GRAIN, J.—I am of opinion that counsel who appears on behalf of the master and owner of this vessel, the sailing ship *Maria*, has not been able to shew any cause why she should not be condemned. He admits that she does not come under Convention VI. or XI. of the Hague Conference, 1907, as although Turkey was a party to that Conference, and the Conventions were signed by her diplomatic representative, they were never ratified by the Sultan of Turkey. But he submits that she comes under an established rule of law that small coasting vessels are exempt from capture and confiscation, and he quotes the judgment of Sir Samuel Evans in *THE BERLIN* (*ante*, p. 29; [1914] P. 265), in which he states his opinion “that it has become a sufficiently settled doctrine and practice of the Law of Nations that fishing vessels plying their industry near or about the coast . . . are not properly subjects of capture in war so long as they confine themselves to the peaceful work which the industry properly involves.”

I am of opinion that this *dictum* applies merely to small fishing boats belonging to men who are earning their livelihood and supplying the food of the small communities on the coasts. The vessel now before me is a general trading vessel of 27 tons, carrying on the general trade of the country, and, as the Hague Conventions do not apply, is liable to capture and confiscation. This ship is therefore an enemy ship lawfully captured, and the order of the Court is that she be confiscated and sold.<sup>1</sup>

(1) See note, *ante*, p. 122.



[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). March 1, 8, 1915.

## THE ANTARES.

*Neutral Cargo—Contraband—Requisition on Behalf of Crown—Prize Court Rules, 1914, Order I. rule 2—Order XXIX. rules 1 and 3—Particulars and Pleadings—Onus of Proof.*

After the outbreak of war, certain copper, shipped by an American company on a Norwegian vessel and consigned to Sweden, was bought afloat by a Swedish firm. The contract of sale guaranteed that the copper was for consumption in Norway and/or Sweden. After the vessel sailed, but before she reached her destination, copper, which had been on the conditional contraband list, was placed by Great Britain on the list of goods absolutely contraband. The vessel was stopped at sea and taken into a British port, and a writ in prize was issued by which it was claimed that the copper belonged to enemies of the Crown, or, alternatively, was contraband, and was liable to confiscation.

Before the suit for condemnation had been heard, an order *ex parte* was made by the Registrar, on the application of the Crown, for the release of the copper to the Lords of the Admiralty. The order purported to be made under Order XXIX.<sup>1</sup> of the Prize Court Rules, 1914, rule 1 of which provided that if it were made to appear to the Judge that the Lords of the Admiralty desired to requisition a ship not yet finally condemned, and there was no reason to believe that the ship was entitled to be released,\* he should order that the ship should be appraised, and that upon payment into Court on behalf of the Crown of her appraised value she should be released and delivered to the Lords of the Admiralty. "Provided that no order shall be made by the Judge under this rule in respect of a ship which he considers there is good reason to believe to be neutral property." Rule 3 provided that if the ship was required forthwith she could be released without appraisal.

(1) By an Order in Council of April 29, 1915, this Order was revoked and a new Order substituted—*vide* THE ZAMORA (*post*, p. 309).

*By Order I. rule 2 it is provided that, unless the contrary intention appears, the provisions of the rules relative to ships shall extend and apply, mutatis mutandis, to goods.*

*On a motion to discharge the order of the Registrar,—Held, that Order XXIX. applied to goods; that rule 3 was subject to the provisions of rule 1; and that there was sufficient doubt whether the goods were entitled to be released to satisfy the provision in the first part of rule 1; but, there being good reason to believe the goods to be neutral property, that the order must be discharged.*

*Pleadings or particulars of the grounds on which the Crown alleges that property seized as prize is confiscable will not be allowed except in extremely special circumstances. The onus is on claimants whose property has been seized as prize to file their claim and prove that the property is not confiscable.*

Motion to discharge an order of the Registrar.

On October 21, 1914, the United Metals Selling Co. shipped 150 tons of copper on the Norwegian steamship *Antares*, then lying at New York, for delivery at Gothenburg, Sweden. The *Antares* sailed on October 24, and whilst she was at sea the copper was bought by the Aktiebolaget Svenska Metallwerken, of Sweden (hereinafter called the Svenska company). The contract of sale guaranteed that the copper was for consumption in Norway and/or Sweden. At the time the *Antares* sailed, copper, by an Order in Council of September 21, 1914, had been put on the list of goods declared by Great Britain to be conditionally contraband; but by a subsequent Order in Council of October 29 it was put on the list of goods absolutely contraband. On November 7 the *Antares* was encountered in the Atlantic by a British warship, and was taken into Liverpool; and a writ in prize was issued, by which the Crown claimed that the copper belonged to enemies of the Crown, or, alternatively, was contraband, and as such, or otherwise, was liable to confiscation.

On December 18 an application *ex parte* was made to the Registrar for an order under Order XXIX. of the Prize Court Rules, 1914, instructing the Marshal forthwith to release the copper to the Lords of the Admiralty, who desired to requisition it.

Order XXIX. rule 1 provided that "If in a cause for the condemnation of a ship in respect of which no final decree has been made, it is made to appear to the Judge on behalf of the Crown that the Lords of the Admiralty desire to requisition the ship and that there is no reason to believe that the ship is entitled to be released, he shall order that the ship shall be appraised, and that upon payment into Court on behalf of the Crown of the appraised value of the ship, the said ship shall forthwith be released and delivered to the Lords of the Admiralty. Provided that no order shall be made by the Judge under this rule in respect of a ship which he considers there is good reason to believe to be neutral property."

Rule 3 provided that "Where in any case of requisition under this Order it is made to appear to the Judge on behalf of the Crown that the ship is required for the service of His Majesty forthwith, the Judge may order the same to be forthwith released and delivered to the Lords of the Admiralty without appraisalment."

By Order I. rule 2: "Unless the contrary intention appears, the provisions of these Rules relative to ships shall extend and apply, *mutatis mutandis*, to goods. . . ."

The Registrar made an order under rule 3 that the copper should be forthwith released to the Admiralty. Four days afterwards, on December 22, the Svenska company entered an appearance, but did not ascertain that the requisitioning order had been made until February, when the present steps were taken to set aside the order.

*Leslie Scott, K.C.*, and *R. H. Balloch*, for the Svenska company.—Neutral goods cannot be requisitioned under Order XXIX. "Ship" in the proviso to rule 1 includes goods, and, as there was good reason for believing the copper to be neutral property, it could not be requisitioned. Even assuming that the proviso only applies to ships and that there is power to requisition neutral goods, the Crown must prove to the satisfaction of the Court, according to the first part of rule 1, that there is no reason to believe that the property is entitled to be released. This copper, being neutral property bound to a neutral country on a neutral vessel, could not be condemned unless on a venture which had an ultimate enemy destination under the doctrine of continuous transport.

It cannot be suggested that the copper was intended for export from Sweden to Germany, for it is urgently required for works in Sweden; and, apart from that, both Sweden and Norway have prohibited the exportation of copper. Therefore, even if neutral goods can be requisitioned, the condition in the first part of rule 1 has not been fulfilled, for there was no evidence before the Registrar on which he could hold that there was no reason to believe the goods were entitled to be released.

*D. Stephens*, for the time charterers, took no part in the arguments.

*The Attorney-General (Sir John Simon, K.C.) and G. W. Ricketts*, for the Procurator-General.—The right of the Crown to requisition neutral property depends on the following propositions:

(1) A belligerent State has a right, according to international law, to appropriate, for urgent purposes of national offence or defence, the property of neutrals, provided it is not within neutral jurisdiction, subject to adequate compensation; and even if the right of appropriation is limited to neutral property within the belligerent State, that condition is satisfied in the present instance.

(2) A subject of another State cannot complain in a British Court of the seizure of his property when the seizure is avowed by the British Government as an act of State; the remedy would be diplomatic.

(3) The foregoing propositions apply to property whether in the custody of the Prize Court or not; but when property has been seized as prize it is proper that the Prize Court should be notified, and should be asked to make the requisitioning order.

With regard to the words of Order XXIX., there was no reason to believe that the goods were entitled to be released, and the provisions of rule 1 were satisfied. Copper was absolute contraband; there was no prohibition against the exportation of copper from Sweden at the time the Registrar made his order; and, further, when issued, the prohibition was limited to copper in the condition in which it entered the country—if converted into copper utensils it could be freely exported from Sweden into Germany.

The copper may or may not be contraband—that has to be decided hereafter—but the Registrar's belief that it was not

entitled to be released is justified by the facts disclosed in the documents before him.

As regards the second proviso in rule 1, that "no order shall be made in respect of a ship which the Judge considers there is good reason to believe to be neutral," it is submitted that it is limited to ships, and is not intended to apply to goods; and in cases where "the contrary intention appears" the provisions of the Prize Court Rules relative to ships do not extend to goods—for example, Order II. rule 23.

The naval and military authorities have full power under the Defence of the Realm Act, 1914, to take possession of warlike stores,<sup>2</sup> and it cannot be disputed that the Crown has both the right and the duty to take all necessary steps for the defence of the country.

[Arguments were also addressed to the Court by the Attorney-General and Mr. Scott on the right of angary; but as the judgment turned solely on the provisions of Order XXIX., and no decision was given on the larger questions raised, these arguments are omitted.]

*Leslie Scott, K.C.*, replied.

SIR SAMUEL EVANS (THE PRESIDENT).—This motion is made on behalf of a Swedish limited company, which we will call, for brevity's sake, the Svenska Company, to set aside an order which was made by the Registrar in these prize proceedings on December 18 last, in respect of 150 tons of copper, part of the cargo laden on board the steamship *Antares*.

The *Antares* is a Norwegian vessel. The copper is claimed as being at all material times the property of the Swedish company. The ship sailed from New York on October 21, 1914, and at that time the copper was consigned by the shippers, the United Metals Selling Co., to C. S. Henry & Co., Lim., as consignees, to be delivered at the port of Gothenburg in Sweden. On October 26, while the ship was still at sea, Messrs. C. H. Henry & Co., Lim., who are the agents in this country of the shippers (who, as I am informed, are an American company), sold the 150 tons in question to the Swedish company, and the letters have been produced relating to that contract, and relating to the payment for the 150 tons. On September 21 copper was declared

(2) See regulation 2 of the Defence of the Realm (Consolidation) Regulations, 1914, authorised by Order in Council of November 28, 1914.

by this country to be conditional contraband, and on October 29 it was declared to be absolute contraband.

The seizure took place at sea on November 7, and the ship arrived in Liverpool, with the cargo on board, on November 14.

Now what I have to decide is whether the Registrar was right in making the order of December 18, which is now complained of by the Swedish company. At that time the Swedish company had not entered an appearance. The time for entering appearance had not expired then, and they did, in fact, enter an appearance on the last day—on December 22. I think myself that they ought to have made enquiries at the time as to whether anything had been done with the copper in the meantime, because it is quite clear that an application might have been made under Order XXIX. before they entered an appearance. However, they did not do so, and it was not until some date in February, 1915, that they ascertained that an order had been made; and I accept the statement of counsel on their behalf, that, as soon as possible after ascertaining that an order had been made, they took these steps to set it aside.

I want it to be perfectly clearly understood that to-day I am only construing, in the light of the facts in this case, Order XXIX. of the Prize Court Rules. I am not deciding anything with reference to the question of contraband, or with reference to any other question which will come up for decision when the prize proceedings come to be heard. Then the merits will have to be fully gone into and a decision given. Nor am I deciding anything to-day about the alleged right of the Crown, in certain circumstances, to seize property like this if it should be necessary either for offence or defence of the realm. Those are matters which have been touched upon by counsel to-day, but, as I intimated in the course of the argument, I do not propose to express any opinion upon them. It is enough for me to give my view whether or not the order of the Registrar is a valid order, having regard to the provisions of Order XXIX.

Now there are two parts of Order XXIX. which have to be looked at in connection with this matter. The first is the provision in rule 1 of the Order as to there being no reason to believe that the ship is entitled to be released; and the next is the proviso to rule 1 which has so often been referred to, "Provided that no Order shall be made by the Judge under this

rule in respect of a ship which he considers there is good reason to believe to be neutral property."

This requisition was made by the Lords of the Admiralty, and a release was ordered under rule 3 of Order XXIX., which provides as follows: "Where in any case of requisition under this Order it is made to appear to the Judge on motion on behalf of the Crown that the ship is required for the service of His Majesty forthwith, the Judge may order the same to be forthwith released and delivered to the Lords of the Admiralty without appraisement." It was admitted, and in my view quite properly admitted, by the Attorney-General, that the provisions as to requisition generally, to be found in rule 1, are applicable to the particular kind of requisition which is comprised within rule 3. I threw out a suggestion to the contrary in the course of the argument, but I do not think that that suggestion of mine, upon consideration, was well founded, and I agree with the submission that the Attorney-General has made.

The question, therefore, is whether or not, when the matter came before the Registrar *ex parte*—as sometimes these matters must come by reason of the urgency of them—the provision of the first rule is satisfied. Counsel for the claimants says that it cannot be argued in this case that there was no reason to believe that the ship was entitled to be released. The Registrar cannot possibly go into all the facts of the case on an application of this kind, and, looking at the case fairly, if he thinks there is a substantial doubt, I think it is enough to entitle him to make an order releasing the property to the Admiralty.

I repeat what I said in the course of the argument: I think that those words can quite fairly be read in another form in this way—that an order can be made where there is some reason to believe that the ship is not entitled to be released.

Now in this case I have used the word "ship" because that is the word that occurs in the Order; but we are dealing here, of course, with cargo, and, as is well known, there is a provision in rule 2 of Order I. which says that, "Unless the contrary intention appears, the provisions of these rules relative to ships shall extend and apply, *mutatis mutandis*, to goods and to freight (if any) due or to grow due; and for such purpose the term 'ship,' when used in these rules, shall also mean 'goods' and 'freight.'" I therefore use the word "cargo" instead of "ship"

here, and I say that there was no such total absence of any reason to believe that the cargo was entitled to be released when the matter came before the Registrar, and I think there was very good reason for the Registrar to believe that the cargo might not be entitled to be released, sufficient, in my judgment, to entitle him to make the order if the first paragraph of rule 1 stood by itself.

The cargo of copper at this time was absolute contraband. It was going to Sweden, to which country at that time a quantity of copper was being shipped, as is well known; and it is quite open for argument when the time comes that this copper, although said to be delivered at Gothenburg, might have Germany as its destination, and as the destination proper to be regarded in this Court. It will be remembered that in the Note sent by the Foreign Secretary to the United States of America at the beginning of this year, reference was made to the shipments of copper to Scandinavian and other countries. Sweden itself is not mentioned separately from the other countries, but is taken with Norway, Denmark, and Switzerland. The figures given by the Foreign Secretary, taken from official returns for the export of copper from the United States for Italy for the months during which the war has been in progress up to the end of the first three weeks of December, are as follows: 1913, 15,202,000 lb.; 1914, 36,285,000 lb.

“Norway, Sweden, Denmark, and Switzerland are not shewn separately for the whole period in the United States returns, but are included in the heading ‘Other Europe’ (that is Europe other than the United Kingdom, Russia, France, Belgium, Austria, Holland, and Italy). The corresponding figures under this heading are as follows: 1913, 7,217,000 lb.; 1914, 35,347,000 lb.” Nearly five times the quantity.

Now I am not saying for a moment that this copper, which was going to Sweden first, was intended for Germany afterwards. I am only considering what the Registrar had before him, and what he himself, quite reasonably, might have thought of the matter when the application was made. Of course I say nothing about the conduct of Sweden; everybody knows that it is a friendly State and preserves its neutrality, and we have been informed, in the course of these proceedings, that on December 5 there was a prohibition by Sweden of the export of certain copper—which would include copper of this description—and



that the prohibition was strengthened by a subsequent one on February 2, 1915. But the temptation to make lucre amongst individuals may be as strong in Sweden as in other countries, and I say that the Registrar was perfectly right in coming to the conclusion which he did before he made the order, that there was no substantial reason for investigating the question as to whether or not this cargo was entitled to be released.

Now I come to the proviso. About this there is more difficulty. The Crown cannot, I think, sustain this order of the Registrar's unless they satisfy me that the contention of the Attorney-General is right that "ship" in the proviso means ship alone, and does not include cargo, because it must be that when the question came before the Registrar these goods were admitted to be neutral goods, and that it was as neutral goods, being contraband, that the claim was made by the Crown that they were confiscable. The proviso reads: "Provided that no order shall be made by the Judge under this rule in respect of a ship which he considers there is good reason to believe to be neutral property." It was common ground before the Registrar—and is the fact now—that this cargo of copper belonged to neutrals at this time, and in that sense was neutral property. The question, of course, to be determined in the prize proceedings is whether, notwithstanding its being property belonging to neutrals, it is confiscable by reason of its offending against the provisions which this country has made with regard to contraband.

The Attorney-General has failed to satisfy me—and I have been entirely unable to satisfy myself—that the word "ship" should be construed differently in the proviso to the word "ship" in the other parts of the rule. "Ship" includes cargo under the first part of the rule—that is the hypothesis upon which this case has been argued, because, if it does not include cargo, then, of course, there was no foundation for making this order at all. The term "neutral," so far as I have been able to find, only occurs twice in the Prize Court rules. First it is in Order II. rule 23, and the second time it occurs is in this proviso to Order XXIX. rule 1.

The Attorney-General referred to the 23rd rule of Order II. as being one of the parts of these rules where it is moderately clear from the context that "ship" was not intended to include cargo. The rule is: "Where a writ is issued in respect of a ship purporting to be neutral, notice of the institution of the

cause shall be sent by the Registrar to the Consular Office of the State to which the ship purports to belong." It may very well be—I have not got to decide that—that in that rule the word "ship" is to be confined to the vessel itself, and does not include the cargo. In various other parts of the rules, "ship," no doubt, is used in that sense; for instance, they mention the ship prosecuting her voyage, and in one of the rules may be found various provisions with regard to the ship and provisions immediately following with regard to the cargo in the ship—as, for instance, in Order XXVII. rule 3. If I am right in saying that the same construction is to be placed upon the word "ship" in the proviso as in the rest of the rule—namely, that it is to include cargo—then the proviso clearly says that no requisition is to be made of any cargo which is neutral property.

I dare say—and I have no doubt myself, having given as careful attention to the matter as I can—that it was the intention of those who framed this rule to make it impossible before the hearing of a condemnation suit to take away the property of the neutral. At any rate, whether that is the intention or not, I think it is so clearly expressed in the rule that I cannot come to any other conclusion.

By decision therefore is that, this being neutral property—being treated as neutral property before the Registrar, and being in fact neutral property, as we know it to be now—the proviso makes it impossible for the Crown to requisition this cargo under the provisions of Order XXIX. And I repeat what I said at the beginning, that I am only dealing with this matter under Order XXIX.; because, whatever other rights the Crown may have, what they did in this case was to invoke the help of Order XXIX. rule 3.

The order of the Registrar, therefore, must be set aside.

*Leslie Scott, K.C.*—With costs?

SIR SAMUEL EVANS (THE PRESIDENT).—No costs against the Crown, I think.

*Leslie Scott, K.C.*—There is a summons adjourned into Court, which was taken out for an order that particulars of the Crown's claim should be given, indicating the grounds for suggesting that the consignments were bound to a contraband

destination, and there is an application for a petition. All the claimants want is a statement of the grounds upon which it is alleged that the Crown is entitled to a decree of condemnation—nothing else.

SIR SAMUEL EVANS (THE PRESIDENT).—This is an application by people against whom prize proceedings have been taken as the owners of the cargo, asking that proceedings should be taken by pleadings, by petition, and by answer, and so forth, and that particulars of various matters should be given by the captors or by the Crown. It has been pointed out over and over again that the procedure in Prize Courts is—and is properly—very different from the procedure in the municipal Courts. I am not going to be a party, except in extremely special cases—there may be some—to the introduction of pleadings, summonses for particulars, &c., into these Prize Court proceedings.

It is the theory of the old Prize Courts, and I think it is a very sound one, that the Crown themselves capture or seize a vessel, and the persons whose property is seized must come here in the course of the proceedings prepared to give grounds why their property is not confiscable. It is enough for the Crown to say, “We regard this vessel or this cargo as prize and we seize it as prize, and we issue a writ against you in which we tell you that we are going to ask the Court for its condemnation.” Thereupon the other parties must file their claim, and it is for them to shew that the seizure and capture by the Crown were not rightfully made.

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*Solicitors*—Kearsey, Hawes & Wilkinson, for claimants; Pritchard & Sons, for time charterers; Treasury Solicitor, for Crown.

[*Reported by E. C. Trehern, Esq., Barrister-at-Law.*]

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[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). March 16, 1915.

## THE CLAN GRANT.

*Cargo—Residence in Enemy Country—Trade Domicile in Neutral Country—Condemnation of Share of Partnership Property.*

*The property of an enemy subject who is domiciled in an enemy country, but has a house of trade in a neutral country, will be treated as enemy property; and if the property belongs to a partnership, in the absence of evidence to the contrary, it will be presumed to be divided proportionately between the partners, and the share attributable to the partner with an enemy domicil will be condemned.*

Suit for the condemnation of the proceeds of sale of 381 packages of beeswax *ex* the British steamship *Clan Grant*, seized at Liverpool on September 23, 1914.

The goods were shipped at Port Sudan on July 23 1914, by Hehlen, Ohm & Co., and were consigned to Hamburg *via* Liverpool. Hehlen, Ohm & Co. were a firm of merchants carrying on business at Khartoum. The firm consisted of three partners, all German subjects, one of whom resided at Khartoum and the other two at Hamburg.

A claim to the release of the proceeds of sale was made on behalf of each of the partners—in whom the property in the goods admittedly remained—on the ground that the firm had a trade domicile in Khartoum, and therefore that their property had a neutral character.

A claim was also put forward by the National Bank of Egypt, which had made advances on the security of the bills of lading.

*Maurice Hill, K.C.*, and *Stuart Bevan*, for the Procurator-General.—Without arguing the strict legal question, the Procurator-General, on behalf of the Crown, is willing to release such share of the proceeds of sale as belongs to the partner of Hehlen, Ohm & Co. resident in Khartoum; the property of the two other partners resident in Germany is confiscable—see THE

HARMONY [1800] (2 C. Rob. 322; 1 Eng. P.C. 241), THE ANTONIA JOHANNA [1816] (1 Wheaton, 159; *Scott's Cases on International Law*, 632), and THE SAN JOSÉ INDIANO [1814] (2 Gall. 268; *Scott's Cases on International Law*, 614).

As regards the National Bank of Egypt, they are merely pledgees, and their claim is covered by the decision in THE ODESSA (*ante*, p. 163; [1915] P. 52).

W. Norman Raeburn, for the claimants, Hehlen, Ohm & Co. and the National Bank of Egypt, admitted that the bank's claim was covered by the decision in THE ODESSA (*ante*, p. 163; [1915] P. 52), and that on the cases which had been cited the shares of the proceeds claimed by the partners of Hehlen, Ohm & Co. resident in Germany were liable to condemnation, but asked the Court to presume that one third share of the proceeds belonged to the partner resident in Khartoum, and to order its release.

SIR SAMUEL EVANS (THE PRESIDENT).—In this case certain portions of cargo which were seized from the *Clan Grant*, a British steamer, have been sold and the proceeds paid into Court.

There is a claim in respect of them by a bank carrying on its business in Egypt. It is admitted that that claim is covered by the decision of this Court in the case of THE ODESSA (*ante*, p. 163; [1915] P. 52), and the bankers do not claim to be more than pledgees of the goods.

With regard to the ownership of the goods there are three claims—one by a Mr. Johannes Heinrich Emile Hehlen, who resides at Khartoum, and the two others by his partners who reside at Hamburg, and are German subjects. Mr. Hehlen, who resides at Khartoum, is also a German subject. There is no evidence here with regard to their shares in the property, and in the absence of evidence it must be taken that they are entitled proportionately, and that therefore each is entitled to one-third of the property which is claimed.

The Crown, acting within their rights, are willing, without raising any question for decision, to release to Mr. Hehlen of Khartoum, one-third of the proceeds in Court, so that no question arises before me as to that one-third. The captor has a full right to release any property he wishes to release, even though it was properly seized at the outset.

With regard to the case of the other two-thirds belonging to these two German subjects, the doctrine is quite clear that, as they have their domicile in Germany, and also are German subjects, the mere fact that they have a house of trade in a neutral country does not affect them, and for the purposes of to-day I regard Khartoum as being in the position of a neutral country. The case would be *a fortiori* against them if it were British territory.

Every one knows that if a person carries on business in the enemy's country he has his commercial domicile there; but the converse of the rule is not extended to the case of a person in a hostile country having a share in the house of trade in a neutral country. The position is dealt with by Mr. Wheaton, who refers to the authorities which have been cited to-day by counsel for the Crown, in a note which reads as follows (p. 335 *Wheaton's International Law* (8th ed. by Dana, 1866)): "The converse of this rule of the British Prize Courts, which has also been adopted by those of America, is not extended to the case of a merchant residing in a hostile country, and having a share in a house of trade in a neutral country. Residence in a neutral country will not protect his share in a house established in the enemy's country, though residence in the enemy's country will condemn his share in a house established in a neutral country." Then Mr. Wheaton criticises that in this way: "It is impossible not to see, in this want of reciprocity, strong marks of the partiality towards the interests of captors, which is perhaps inseparable from a prize code framed by judicial legislation in a belligerent country, and adapted to encourage its naval exertions." He of course does not say that that is not the law, but he is criticising what he deems to be the partiality of it.

It is interesting to see a note by Mr. Dana, whose edition of Wheaton is well known, in which he disagrees with his author, and in which he says this: "But there seems to be no sound reason for demanding the application to these cases of what is called reciprocity. Reciprocity implies two parties, who make some equitable exchange or offset of rights or benefits yielded or enjoyed. The cases stated in the text are rather those of two positions of a third party, each having an element of hostile connection, presented conversely. In the one case, a stranger to the belligerents is a neutral, as far as his personal domicil is concerned, but has an active commercial interest

involved with the enemy's interests, and subject to the enemy's control and taxation. In the other his special commercial interest referred to is neutral, as far as its locality is concerned; but, by reason of his personal domicile, he is himself subject to the enemy's control, and liable to compulsory service, and to unlimited taxation and forced contributions, which may reach and include the profits of his commercial house in the neutral country. The decision of the one case in the affirmative carries with it no argument that the other should be decided in the negative. The two cases are independent. The question in each is, whether the element of hostile connection or control which it presents, is sufficient to warrant a belligerent in taking the property *jure belli*."

That is the note of Mr. Dana. It seems to me unnecessary to discuss the question whether there ought to be reciprocity in the two cases. It is enough for me to state what the law is, and it is clear according to the law that the property of these two gentlemen who reside in Hamburg and have a house of trade in Khartoum is confiscable, and I order the condemnation of the proceeds.

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*Solicitors*—Treasury Solicitor; Norton, Rose, Barrington & Co.

[*Reported by E. C. Trehern, Esq., Barrister-at-Law.*]

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[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT).

March 29. April 26. May 3, 1915.

THE POONA.

*Cargo — Enemy Character — British Company — Enemy Directors and Shareholders.*

*Goods consigned to a duly incorporated British company, to which the property has passed, are not confiscable as prize by reason of the fact that all the directors and shareholders of the company are enemy subjects or domiciled in an enemy country.*

CONTINENTAL TYRE &C. CO. v. DAIMLER CO., LIM. [1915]  
(84 L. J. K.B. 926; [1915] 1 K.B. 893), *applied*.

*Quære, whether a British company, composed entirely of alien enemies, can own a British ship.*

Cause for condemnation of cargo as prize.

Before the outbreak of war a German manufacturing company, Isaria Zahlerwerke, of Munich, consigned a parcel of goods, consisting of five cases of electric fans, to a traveller in Melbourne for sale. The goods proving unsuitable for the Australian market, they were re-shipped on the British steamship *Poona*, and consigned to a British company, Isaria, Lim., in London. On October 17, 1914, after the arrival of the *Poona* in the Port of London, the goods were seized as prize.

A claim was entered by Isaria, Lim., as an English company to which the property in the goods had passed. It was contended, however, on behalf of the Crown, first, that the property in the goods still remained in the Isaria Zahlerwerke, of Munich; and secondly, that, even if the property had passed to Isaria, Lim., the goods were none the less liable to condemnation, inasmuch as 1,244 of the 1,250 shares in that company were held by the Isaria Zahlerwerke, and five of the remaining six shares by German subjects resident in Germany. The remaining share was held by an employee of the Isaria Zahlerwerke, who was apparently a Frenchman, but resident in Munich.

*John B. Aspinall*, for the Procurator-General.

*A. W. Elkin*, for the claimants.

[The arguments sufficiently appear in the President's considered judgment. In addition to the cases there cited, counsel for the Procurator-General referred to a letter of Lord Lindley to the *Times*, agreeing with the dissenting judgment of Buckley, L.J., in *CONTINENTAL TYRE &C. CO. v. DAIMLER CO., LIM.* [1915] (84 L. J. K.B. 926; [1915] 1 K.B. 893).<sup>1</sup>]

*Cur. adv. vult.*

(1) In the course of this letter Lord Lindley said, dealing with the judgment of the Court of Appeal in *CONTINENTAL TYRE Co. v. DAIMLER Co., LIM.*: "The Court, with one dissentient, came to the startling conclusion that a joint stock company registered and incorporated under the Joint Stock Companies Acts, but completely under the



May 3.—SIR SAMUEL EVANS (THE PRESIDENT).—The claimants to the goods seized and claimed in these proceedings are a company named Isaria, Lim., which was incorporated in May, 1912, and whose registered office at the time of the outbreak of war was 208 Tower Bridge Road, in the County of London.

The company carried on business in this country and abroad. The goods (with others) had been sent out to Australia for sale, and were returned to the company in August, 1914. They were seized in the Port of London as prize on October 17, 1914.

After investigation of the facts I was satisfied that the goods at the time of seizure belonged to the company. The question which remained for decision was whether, having regard to the constitution of the company, the goods were enemy property subject to seizure.

At all material times the number of shares in Isaria, Lim., issued was 1,250 shares of 1*l.* each. Of these, 1,244 were held by the Isaria Zahlerwerke, of Munich, a German manufacturing company; one share was held by each of the four directors of Isaria, Lim., who were German subjects and resident in Germany; one other share was held by one Schönmann, the secretary of the company, also a German subject; the remaining share was held by one Vallée, who was said to have been a French subject, but who for some time before the war had resided at Munich, and been employed by the German company, the Isaria Zahlerwerke.

control of Germans resident in Germany, was an alien friend and entitled to maintain an action in our Courts, and not an alien enemy and therefore unable to do so.

"This decision is so important and opposed to the principle of public policy underlying the law which prevents alien enemies from suing in this country whilst our country is at war with theirs, that I trust that the decision will be reconsidered by appeal to the House of Lords. If not reversed, I hope that a short Act of Parliament will be passed to alter the law in this respect.

"The short grounds on which I think the decision wrong are that it sacrifices substance to form and justice to fiction. Corporations are regarded as persons; but this is only a convenient form of expression, and a fiction which, if treated as a fact and made a basis from which to infer consequences, may lead to grotesque and mischievous results. *In fictione juris semper aequitas existit* is a well-known legal maxim which ought to be borne in mind. What sort of person ought such a corporate body as the Court had to deal with to be regarded? There is no law that I know of which excludes the answer that common sense suggests. The persons seeking to sue were in fact alien enemies under cover of a fictitious name."—*The Times*, Jan. 28, 1915.

Schönmann left this country on August 3, 1914, for Germany, having purported to appoint one of the company's employees, Mr. Frank Morton, to be manager.

Mr. Morton represented the company in these proceedings. After the outbreak of war he was informed by the Board of Trade that they were advised that there was no objection to the sale from the stock of the company of goods imported from Germany before the war, and that no licence was required for that purpose. Later on (in November last) he was informed by the Comptroller of the Companies Department of the Board of Trade that as Isaria, Lim., was a company incorporated in this country, there was nothing (having regard to section 3 of the Trading with the Enemy Proclamation, No. 2, dated September 9)<sup>2</sup> to prevent trading with the company, or the payment to it of money which might be owing to it. So Mr. Morton appears to have carried on the business of the company; and the books and papers of the business have been inspected when required by the official accountant appointed by the Board of Trade.

For the claimants it was contended that the goods belonged to an English company, not to alien enemies, and were not subject to seizure or confiscation.

On the other hand, it was argued for the Crown that, as all the directors were enemy subjects and resident in Germany, and all the shareholders were also either enemy subjects or resident in Germany, the goods were in reality the property of alien enemies, and ought to be condemned as such.

I was referred to my decision in this Court in *THE ROUMANIAN* (*ante*, p. 75; [1915] P. 26); and, of course, to the judgments pronounced later by the Court of Appeal in *CONTINENTAL TYRE & C. CO., LIM. v. DAIMLER CO., LIM. and v. THOMAS TILLING, LIM.* (84 L. J. K.B. 926; [1915] 1 K.B. 893).

I will only observe as to *THE ROUMANIAN* (*ante*, p. 75; [1915] P. 26) that it does not necessarily govern this case. The facts there were different in important and material respects; moreover, I think it will be found that in the course of the arguments

(2) Section 3 provides that: "The expression 'enemy' in this Proclamation means any person or body of persons of whatever nationality resident or carrying on business in the enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country. In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country."

in THE ROUMANIAN (*ante*, p. 75; [1915] P. 26) counsel for the claimants expressly admitted that the Europäische Petroleum-Union Gesellschaft M.B.H. of Bremen was a German company; and the case was dealt with accordingly. The judgments in the Court of Appeal in the CONTINENTAL TYRE CO. CASES (84 L. J. K.B. 926; [1915] 1 K.B. 893), however, bear directly upon the point arising in the present case. What, therefore, ought I to do in this Court in view of those decisions?

In matters relating to prize, the Court of Appeal does not bind this Court, for the reason that no appeal lies to the Court of Appeal from judgments given in the Prize Court. The only appellate Court in such cases is the Judicial Committee of the Privy Council.

If I were of opinion that different principles applied in the present proceedings in a Court of Prize, or if I held a strong opinion upon the legal aspects, even if the same principles were applicable, I conceive it would be my duty to give effect to such opinion, even though it differed from that of the Court of Appeal. But I do not think in the present case different principles ought to be applied. The matter in controversy appears to me to be one which should be regarded from the point of view of municipal law; and no question of an overriding principle of international law arises.

The claimants come forward as a company incorporated in accordance with the law of this country. The claim is not made by the individual shareholders—subjects of a foreign country, enemy or otherwise. The question turns upon the *status* of the company in this kingdom. Accordingly, nothing in this case depends upon the bearing of the law of nations upon our municipal law.

In these circumstances, I think it more respectful to the Court of Appeal to act in accordance with their judgment, however much I might feel inclined to sympathise with the dissentient views of Lord Justice Buckley.

In the special facts of this case and of the CONTINENTAL TYRE CO. CASES (84 L. J. K.B. 926; [1915] 1 K.B. 893), a decision in accordance with Lord Justice Buckley's judgment might be easy; but it is fairly obvious that with even a slight variation of facts as to the holding of the shares, the adoption of a definite general principle as a foundation for his judgment and its application, would give rise to great difficulties.

Without dealing with it any further, I may observe that even in Lord Justice Buckley's dissenting judgment this passage is to be found:

"The corporation, if it be a British corporation, stands in the same position for most purposes as a British subject. For instance, as regards right of ownership of property and the right to protection and assistance by the law. But while it stands for most purposes in the position of a British subject, it cannot, I think, be correctly described as a British subject" (84 L. J. K.B., at p. 944; [1915] 1 K.B., at p. 916).

The question before me deals with "rights of ownership." For the reasons stated, I am content to accept respectfully the law as laid down by the Court of Appeal, and must leave the ultimate decision to a higher tribunal.

If the judgment of the majority of the Court of Appeal is unsound, it must be so pronounced by the House of Lords on appeal from them; or by the Privy Council on appeal from this Court. If it is affirmed as good law, but is considered to require alteration as a matter of just policy, then the Legislature must act.

I desire to add one word by way of reservation. The case of the ownership of vessels registered in this country is so special, having regard to our merchant shipping legislation, that I venture to repeat what I said in *THE TOMMI* and *THE ROTHERSAND* (*ante*, p. 16; [1914] P. 251), and to reserve expressly all questions which might arise if it were contended that a British vessel was the property of a company constituted like that of *Isaria, Lim.*

The judgment of the Court is that the goods seized are not enemy property; and I order their release.

On their release they will be delivered over to Mr. Morton, the present manager of *Isaria, Lim.*, and he, of course, will deal with them as belonging to the English company; and he will not be able to deliver them or their proceeds over to the alien enemy shareholders of the company, or to use them, or to apply their proceeds for the benefit of any such shareholders during the existence of the war.

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*Solicitors*—Treasury Solicitor; Russell & Arnholz.

[*Reported by E. C. Trehern, Esq., Barrister-at-Law.*]

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## [ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). May 10, 1915.

## THE SIMLA.

*Parcel Post—Enemy Goods—Shipped on Enemy Vessel—Hague Conference, 1907, Convention XI. art. 3—Extent of Exemption.*

*Article 1 of Convention XI. of the Hague Conference, 1907, which provides immunity from capture to postal correspondence found in an enemy ship, does not apply to parcels sent by parcel post.*

Cause for the condemnation of goods sent by parcel post.

The subject-matter of this claim was a number of parcels of miscellaneous goods, consisting of elephant tusks, leopard and snake skins, and curios, sent by parcel post by German colonists in German East Africa, addressed to various persons resident in Germany. The goods were shipped on the German mail steamer *Emir*, which was captured by a British warship after the outbreak of war between Great Britain and Germany, and was taken into Gibraltar, where she was condemned. The goods in question, of which there were thirty-one packages, were re-shipped in the British steamship *Simla*, and were seized on January 27, 1915, by the collector of Customs in the Port of London, after the arrival of the *Simla* in the Thames.

*Harold Murphy*, for the Procurator-General.—Article 1 of the Eleventh Hague Convention, which provides that “The postal correspondence, whether of neutrals or of belligerents, and whether its character is official or private, found at sea in a ship, whether neutral or enemy, is inviolable,” does not apply to parcels sent by parcel post. Herr Kriege, the German delegate at the Conference, who proposed this particular regulation, explained that “postal correspondence” was not intended to include parcels—see *Westlake’s International Law*, vol. 2 (2nd ed.), p. 185) and *Oppenheim’s International Law*, vol. 2 (2nd ed.), p. 237.

[SIR SAMUEL EVANS (THE PRESIDENT).—There is no one here to suggest that these goods are inviolable?]

No; there has been no communication at all, and no appearance has been entered.

SIR SAMUEL EVANS (THE PRESIDENT).—Very well. There is no appearance, and I order that the goods be condemned.

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*Solicitor—Treasury Solicitor.*

*[Reported by E. C. Trehern, Esq., Barrister-at-Law.]*

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[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). May 17, 1915.

THE KATWYK.

*Cargo—Neutral Vessel—Conditional Contraband—Date of Seizure—Condemnation of Cargo—Delay of Vessel—Shipowners' Claim to Freight and Demurrage—Declaration of London, 1909.*

*On September 16, 1914, a neutral vessel left a neutral port with a cargo of iron ore consigned to neutrals at another neutral port, but destined for Krupp's works at Essen, in Germany. On September 19, when the vessel arrived off the Isle of Wight, she was stopped by a British warship and ordered to go to an anchorage for the examination of her papers and cargo. By a proclamation of September 21, 1914, iron ore, which had been on the free list, was placed by Great Britain on the conditional contraband list. On September 26 the cargo was detained, and on October 4 formally seized as prize, and the vessel was sent to another port for its discharge.*

*At the hearing of the suit for the condemnation of the cargo the shipowners claimed freight and demurrage or damages for detention. The Crown resisted the claim on the ground that the shipowners were acting as agents for the forwarding agents of Krupps.*

*Held, first, that the effective seizure took place after iron ore had been put on to the conditional contraband list, and that the cargo must be condemned; secondly, that as the cargo was innocent when the vessel started on her voyage, her owners, notwithstanding the fact that they might have business relationship*

*with Krupps, were entitled to some freight, to be calculated in accordance with the principles laid down in THE JUNO (ante, p. 151); thirdly that the claim for demurrage or detention must be disallowed.*

Cause for condemnation of cargo as prize.

Claim by shipowners to freight and demurrage.

The subject-matter of the claim in this cause was 3,350 tons of iron ore, shipped on board the Dutch steamship *Katwyk* at the port of Castro Urdialas, Decido, near Bilbao, and consigned to Rotterdam.

The *Katwyk* belonged to the Maatschappij Stoomschip Katwyk, a duly incorporated Dutch company, of which Messrs. Erhardt & Dekkers of Rotterdam were directors, and acted as managing owners.

The ore was loaded on September 16, 1914, in pursuance of a charterparty dated September 10, 1914, and made between the shipowners and Messrs. Ruys & Co., merchants and shipbrokers of Rotterdam, whereby the *Katwyk* was to proceed to a Spanish port and load the ore which, under the bills of lading, was deliverable at Rotterdam to Ruys & Co. or their assigns, but was in fact destined for Krupp's works at Essen, in Germany, one of the members of Erhardt & Dekkers being the manager of Krupp's forwarding agent at Rotterdam, and another member of the firm resident at Cologne.

At the time of shipment iron ore was not contraband, but by an Order in Council of September 21, 1914, it was placed on the conditional contraband list.

On September 19, when the *Katwyk* was off the Isle of Wight, she was stopped by a British torpedo boat and ordered to proceed into Sandown Bay for the examination of her cargo. On the 21st she was sent to Ryde Roads, off Portsmouth, for examination; on the 26th the cargo was examined and detained; and on October 4 both ship and cargo were formally seized as prize.

The *Katwyk* was detained until October 19, when, by the orders of the Admiralty, she proceeded to Middlesbrough in charge of a Government pilot to discharge the cargo, which meanwhile had been sold by the Admiralty Marshal to a firm at Middlesbrough. She was then released, and finally left that port on October 28.

No appearance was entered in respect of the cargo, and the Crown claimed its condemnation as being contraband property destined for the enemy Government, seized after the proclamation of September 21, 1914.

The shipowners claimed freight—1,130*l.* 12*s.* 6*d.*; "Extra freight for the voyage to Middlesbrough, or demurrage or damages for detention or delay from September 19 until October 19"—610*l.* 16*s.* 8*d.*; and extra sea pilotage, 15*l.*

*The Attorney-General (Sir John Simon, K.C.), and Stuart Bevan, for the Procurator-General.*—The effective seizure of the cargo did not take place until a date subsequent to the proclamation of September 21, 1914, which placed iron ore in the list of goods conditionally contraband; it cannot be disputed that the cargo was destined for Krupp's works, and it should be condemned. The case was before the Court on February 15, and was adjourned for fuller representation—

[SIR SAMUEL EVANS (THE PRESIDENT).—I thought some question was raised as to whether property could be seized when it has not been declared contraband until after the ship sailed?]

Yes. The matter stands in this way. The Declaration of London, 1909, is not a binding document on any of the nations of the world, and when the war broke out the matter was at large. There is no universal or general agreement as to what is contraband or what is not, and as there are many other points on which the practice varies, the usual course has been for belligerent States to give public notice of the practice which they propose to follow—not because there is a rule that they must do so, but as an act of international probity and convenience.

It was thought convenient, therefore, to give information by Order in Council of the course Great Britain was prepared to follow and the rules she would submit to. Accordingly, by an Order in Council of August 20, 1914, it was announced that the Declaration of London would be put in force during the war as if it had been formally ratified by His Majesty, but with certain additions and modifications; and one of the additions and modifications was that the list of absolute and conditional contraband contained in the proclamation dated August 4, 1914, should be substituted for the lists contained in articles 22 and 24 of the Declaration. Under the proclamation of August 4 metallic ores were not contraband, and, but for the proclamation of Sep-



tember 21, it might have been said that Great Britain did not intend to treat iron ore as contraband. The shipowners, therefore, are entitled to say that, when the *Katwyk* started on her voyage, the cargo was free and could not be seized; and, as a general proposition, it cannot be disputed that a vessel in such a position is entitled to favourable treatment. But the shipowners' claim to freight should fail on the ground of the close relationship which existed between Krupps, of Essen, and Erhardt & Dekkers, who in fact owned the *Katwyk*, and had entered an appearance, and were the persons on whose behalf counsel for the claimants really was appearing. If, as appeared from the documents, Erhardt & Dekkers, or some member of that firm, purchased the ore at Bilbao, and there was a course of dealing between Bilbao and Rotterdam whereby the *Katwyk* was chartered to provide material for munitions of war to Germany, it is not a case in which the Court, in its discretion, will order the Crown to pay freight; and it follows that the further claim for demurrage and detention should also be disallowed—see THE ROUMANIAN (*ante*, p. 75).

*C. R. Dunlop*, for the shipowners.—When the ship sailed her cargo was innocent, and there is no reason for refusing to pay some freight. Further, the effective date of the seizure of the cargo was September 19, when the *Katwyk* was stopped and accompanied into Sandown Bay by the British torpedo boat. The *Katwyk* did not come in voluntarily, but in pursuance of orders, and there was an effective seizure on that date with a view to the condemnation of the ship or cargo if they proved to be enemy. If that was the date of seizure the cargo was not contraband.

[SIR SAMUEL EVANS (THE PRESIDENT).—In that case I must release the cargo to somebody.]

I think it ought to be released to its owners.

[SIR SAMUEL EVANS (THE PRESIDENT).—Who are they?]

I do not know; I do not appear for them. The cargo was shipped by a Spanish firm and consigned to a Dutch company, and the relations of that company to Krupps—whatever they may be—has nothing to do with the claim of neutral shipowners to freight and demurrage. The cargo was carried to this country, and the ship was detained and was made use of by the Government to carry the cargo to the purchasers from the Admiralty Marshal, and the claim for extra freight or damages for detention should be allowed.

SIR SAMUEL EVANS (THE PRESIDENT).—In this case the Crown seeks for a decree of condemnation of 3,350 tons of iron ore, laden upon the Dutch ship *Katwyk*, which was seized as prize in September, 1914.

There has been some discussion as to when the cargo was definitely seized. Nobody appears for the owners of the cargo; but counsel for the ship suggested that the seizure was before September 21. I decide, upon the affidavits which have been read by the Attorney-General, that the cargo was not seized before September 26. It is not necessary for me to go any further and to declare whether it was in fact seized on September 26, or on October 4. If it was not seized until September 26, then, by that date, the proclamation of September 21 had been issued, in which it was declared that iron ore would be regarded as contraband. It is, of course, within the power and function of the Crown to add to the list of contraband from time to time, and, acting in pursuance of the undoubted power vested in the Crown, this proclamation was issued on September 21. I therefore decree the condemnation of this cargo as contraband seized after the proclamation was issued.

Now a claim has been put forward by the owners of the *Katwyk* to the freight, and to other sums of money which they call demurrage, or damages for detention. The ship belongs to a Dutch company. It is admitted that she sailed upon her voyage on September 16 carrying this cargo, which was then not contraband. She started, therefore, upon a perfectly innocent voyage. According to the principles which have been agreed upon in the Declaration of London—principles upon which I think it would be right for this Court to act, apart from the binding character of the Declaration—the ship could not be condemned by reason of the cargo being declared contraband after starting on the voyage. *Prima facie*, therefore, the owners of this ship, the Dutch company, would be entitled to some freight.

The Attorney-General, however, has pointed out to me certain facts with reference to the firm of Messrs. Erhardt & Dekkers, and with regard to the position of Mr. Dekkers himself, and the relationship which they apparently had in business with Messrs. Krupp. Whatever their position was at the time when they started upon this voyage intending to carry this cargo—I doubt

not to Messrs. Krupp, for the purpose of being converted into munitions of war—they do not seem to have been on very friendly terms with the German Government afterwards, because, I am told, that the *Katwyk* has been torpedoed by one of the German torpedo boats. I do not know whether they knew, or whether they cared, that she was a ship belonging to Messrs. Erhardt & Dekkers, who had been in close business connection with Messrs. Krupp's firm.

Now is there enough before me to displace the *prima facie* claim which these people have, as owners of the ship, to the freight? It is to be observed, that at this time there is no reason whatsoever why Messrs. Erhardt & Dekkers should not be engaged in business transactions with Messrs. Krupp, and should not make a profit out of them if they could, and I see no reason here for depriving the owners of this neutral vessel of such freight as ought, in all the circumstances of the case, to be given to them. The amount of freight will be decided upon reference to the Registrar and Merchants, and regard will be had to all the circumstances, some of which I have pointed out in the case of *THE JUNO* (*ante*, p. 151).

With regard to any further claim for demurrage or detention I disallow it. This vessel, like other vessels, ran some risks. I have no doubt myself that if the matter was considered at all, the master—or the charterers—might very well have said, "Well, we are starting on an innocent voyage now; but we wonder whether iron ore will be added to the list of contraband before reaching Rotterdam"—as in fact it was. Now such detention as they were put to—such loss as occurred to them by reason of that detention—is part of the inconvenience and loss which unfortunately have to be suffered even by neutrals in the dire circumstances of war.

I therefore disallow any claim except such claim for freight as ought reasonably to be allowed.

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*Solicitors*—Treasury Solicitor; Clarkson & Co.

[*Reported by E. C. Trehern, Esq., Barrister-at-Law.*]

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[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). June 2, 4, 1915.

## THE NINGCHOW.

*Cargo—Enemy Pledgors—Default—Contracts of Sale Entered into by Pledgees—Pledgor's Loss of Right to Redeem—Enemy Character of Goods Changed.*

*Before the outbreak of war a German firm at Hankow contracted to sell certain goods to a British firm in Liverpool. The goods were shipped on a British vessel, and an advance was obtained from a Japanese bank upon the security of the shipping documents, which were indorsed to the bankers. After war broke out the British merchants refused to take up the goods or the documents representing the goods, and, the German firm being in default, the bankers, as pledgees, contracted to sell the goods to another British firm. Subsequently, when the vessel arrived at Liverpool, the goods were seized as prize:—Held, that when the contracts of sale were entered into by the bankers, whether or not the property had passed to the purchasers, the enemy pledgors lost the right to redeem and ceased to be the owners of the goods, and therefore at the time of seizure the goods were no longer enemy property, and must be released.*

Cause for the condemnation of cargo as prize.

The following statement of facts is taken from the judgment:

“The subject-matter of this claim consists of 233 packages of green vegetable tallow, which formed part of the cargo laden on the s.s. *Ningchow*, of Liverpool. This part of the cargo was seized by the officers of His Majesty's Customs at the port of Liverpool on October 29, 1914.

“The claimants are the Yokohama Specie Bank, Lim., of 7 Bishopsgate, in the City of London, Japanese subjects, and Thornett & Fehr, of Baltic House, in the City of London, tallow brokers, British subjects.

“The goods were shipped at Hankow before the war, and were consigned by subjects of the German Empire. The vessel in which they were laden arrived in the port of Liverpool on August 17, 1914.

"The Yokohama Specie Bank were indorsees and holders of the bills of lading representing the goods at the time of the shipment and at the time of their arrival at Liverpool, and were at all material times up to the contracts of sale of October 14 and 22, 1914, hereinafter referred to, the pledgees of the goods, in respect of advances amounting to about 660*l.* made upon the security of this pledge. These advances had been made before the commencement of the war. The rights of the bank have therefore to be regarded upon principles applicable to *ante bellum* conditions, as nothing happened subsequently which affected these rights. The pledgors were enemy subjects—Messrs. Schnabel, Gaumer & Co., carrying on business at Hankow, Shanghai, and Hamburg.

"The enemy subjects had contracted to sell the goods to a British firm—Messrs. MacAndrew, Morland & Co.—who declined to take up the documents representing the goods, or to take delivery of the goods themselves after the declaration of war, from enemy subjects. Thereupon the bank, as pledgees, proceeded to deal with the goods.

"It was admitted by counsel for the Crown that the enemy subjects, who were the pledgors to the bank, were in default, and that the bank, as pledgees, by reason of such default and after the requisite notice to their pledgors, became entitled to exercise their power of sale in order to make the pledge effective, before the goods were seized as prize.

"The bank accordingly, in exercise of their rights as pledgees, entered into two contracts of sale with Messrs. Thornett & Fehr, dated respectively October 14 and 22, 1914, whereby they contracted to sell the goods in question to Thornett & Fehr in the terms set out in the written contracts."

*Aspinall, K.C., H. C. S. Dumas, and E. C. Trehern* (with them *G. Langton*, who was serving with His Majesty's Forces), for the Procurator-General.

*D. M. Hogg*, for the claimants, the Yokohama Specie Bank and Thornett & Fehr, who made common cause.

The arguments of counsel appear from the judgment.

*Cur. adv. vult.*

*June 4.*—SIR SAMUEL EVANS (THE PRESIDENT) stated the facts set out above, and continued: Counsel for the Crown contended—First, that Thornett & Fehr were not real purchasers, but only

brokers acting on behalf of the bank; and secondly, that, even if they were the purchasers, the property in the goods had not passed to them; and that, notwithstanding the contracts of sale, the goods remained confiscable as enemy property belonging to the pledgors.

As to the first contention, I was satisfied upon the evidence, and find as a fact, that Thornett & Fehr were not acting as brokers, but as principals. Upon the second contention, arguments were addressed to the Court that, according to the law applicable to the sale of goods, the property in the goods had not at the time of their seizure passed to the intending purchasers; and that the goods still remained the property of the enemy subjects, notwithstanding their pledge to the bank and the action that the bank took.

In my view the enquiry as to whether the property in the goods had so passed is irrelevant to the question which has to be determined in this case, which is whether the goods belonged to enemy subjects at the time of the seizure.

The rights of a pledgee have been succinctly stated in the judgment of Lord Justice Cotton (which was the joint judgment of the Lord Justice himself and of Lord Justice Lindley and Lord Justice Bevan) in the case of MORRITT, *In re*; OFFICIAL RECEIVER, *ex parte* [1887] (56 L. J. Q.B. 139, at p. 142; 18 Q.B. D. 222, at p. 232), in this passage:

“A contract of pledge carries with it the implication that the security may be made available to satisfy the obligation, and enables the pledgee in possession (though he has not the general property in the thing pledged, but a special property only) to sell on default in payment and after notice to the pledgor, although the pledgor may redeem at any moment up to sale.”

As I have before said, it was admitted by counsel for the Crown that in this case there was default by the pledgors, and that notice had been given by the pledgees before they entered into the contracts for sale. In short, it was admitted that the pledgees were entitled to exercise their power of sale. I think that the phrase in Lord Justice Cotton's judgment, that the pledgor may redeem “at any moment up to sale,” means at any moment up to the time of the exercise by the pledgee of his power of sale by entering into a valid contract for sale.

The right of the enemy pledgors to redeem had therefore been lost to them, and accordingly they ceased to be in any

sense the owners of the pledged goods when the bank contracted to sell, apart entirely from any question which might exist, as between the sellers (the pledgors) and their purchasers, of whether, according to the law of the sale of goods, the property remained in the sellers or had passed to the purchasers.

In the view I take of the case it is unnecessary to deal with the facts relating to the orders to the warehousemen to hold the goods for the purchasers.

I hold that when the contracts for sale of October 14 and 22 were made, the enemy pledgors had ceased to be the owners of the goods which were subsequently seized. These goods were therefore not subject to seizure as enemy goods.

The bank and the purchasers from them make common cause, and the bank assent to the claim of their purchasers.

I decree accordingly that the goods in question be released to the claimants, Messrs. Thornett & Fehr.

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*Solicitors*—Treasury Solicitor; Crosley & Burn.

[*Reported by E. C. Trehern, Esq., Barrister-at-Law.*

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[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). June 3, 7, 1915.

## THE IOLO.

*British Ship—Cargo Loaded Before War—Seizure—Release to Allied Claimants—Shipowner's Claim to Freight.*

*According to prize law, when cargo loaded before war for carriage in a British ship is seized as prize before it reaches its port of destination, and is discharged and sold in a British port, and, without being brought before the Prize Court, the proceeds of sale are released, the shipowners are entitled to such a sum out of the proceeds for freight as is fair and reasonable in the circumstances, to be calculated in accordance with the principle laid down in THE JUNO (ante, p. 151).*

Summons adjourned into Court for argument.

The facts, as stated in the judgment, were as follows :

The substantial question to be determined upon the application now before the Court is whether the Russian Bank for Foreign Trade is entitled to the whole of the proceeds of the sale of certain cargo, originally seized as prize, without any deduction in respect of freight or other charges claimed by the shipowners.

The steamer *Iolo* is a British vessel. She started before the war from the port of Nicolaieff upon a voyage to Hamburg laden with various cargoes destined for Hamburg and for German consignees. Part of the cargo consisted of two parcels of barley, one for 30,280 poods and the other for 156,580 poods (making a total of 186,860 poods), which, or the proceeds of sale of which, were claimed in these proceedings by the said bank, hereinafter called "the Russian Bank."

The Russian Bank was a bank incorporated under the laws of the Empire of Russia with its head office at Petrograd, and with branches elsewhere in the said Empire, and in other European countries, including England, but not Germany or Austria.

While the ship was on her voyage war was declared. The shipowners apprised the British Admiralty of her movements, and asked for instructions. The Admiralty advised that the ship should proceed to Falmouth. This was communicated to the ship as she was passing Gibraltar. But before she reached the Lizard she was directed to proceed to Barry Dock, and arrived there on August 19 last. On her arrival there her cargo was seized as prize by the Customs authorities acting for the Procurator-General of the Crown.

On August 31 the writ in these prize proceedings was issued against the owners of the goods laden on the vessel, including the portion subsequently claimed by the Russian Bank. On September 2, by the order of this Court, the Marshal was authorised to sell the cargo, and it was sold accordingly, and the proceeds of sale were paid into Court in these proceedings. On September 4 an appearance was entered on behalf of the Russian Bank, claiming as owners of the 186,860 poods.

The ship was directed by the Marshal to proceed from Barry to Portishead to discharge the cargo for delivery to the purchasers. On October 7 the shipowners entered a *caveat* against



the payment out of the proceeds of the sale without notice to them. The object of entering the *caveat* was to secure payment of the freight and other expenses claimed by the ship-owners.

Shortly after the seizure the Marshal had given to the ship-owners an undertaking in the following terms :

“I undertake to pay you on the completion of the discharge of the cargo the amount of the ascertained freight and charges on the out-turn in the terms of the charter-party and bills of lading.”

In accordance with this the Marshal paid the shipowners 1,750*l.* on account.

Later, the shipowners delivered particulars of their claim in respect of the whole cargo, which summarised was as follows : First, freight, as per C/P 2,118*l.* 6*s.* 9*d.*; secondly, charges at Barry, 119*l.* 14*s.* 4*d.*; and thirdly, claim for detention or loss of time, 1,080*l.*

Roughly speaking, rather more than half of this claim, if allowed, would fall upon the portion of the cargo claimed by the Russian Bank. After entering appearance in these proceedings the bank instituted an action in the King's Bench Division of the High Court asking for a declaration as to their rights. This action was subsequently abandoned.

Certain communications passed between the Russian Bank and the Procurator-General, the result of which was that the Procurator-General consented to release to the bank the net proceeds of part of the cargo to which they laid claim, upon the bank giving an indemnity in writing on or about November 19.

The document evidencing this arrangement was in the following terms :

“*In Prize.*

“*s.s. Iolo.*

“WHEREAS the undermentioned goods have been seized as prize: AND WHEREAS the Russian Bank for Foreign Trade claims to be entitled to the goods hereinafter described, and has requested the Procurator-General to consent to an Order for the release to them of the said goods: AND WHEREAS the Procurator-General is willing upon receiving the following indemnity (and subject to such other conditions (if any) as may have been arranged between the parties) to consent to such an Order :

“Now, in consideration of the Procurator-General agreeing to give such consent, the said Russian Bank for Foreign Trade undertakes to indemnify the Procurator-General, whether on his own behalf, or on behalf of the Crown, or on behalf of the Admiralty Marshal, or of any officer or official of the Crown, or of the Prize Court, or of any person acting under the authority or instructions of the same, or of any one or more of them, against all petitions (including petitions of right) claims, proceedings, actions, or demands for or in respect or on account of the goods or any part thereof, or any proceeds thereof or arising directly or indirectly out of or connected with the seizure, detention or release of the goods or any part thereof, and against all costs, damages, and expenses in respect of the premises. And the bank hereby undertake to refund to the Procurator-General any sum or sums of money which may hereafter be found to have been paid or may be paid for the said parcels or any of them by an alien enemy.”

Then followed a description of the goods by reference, and the numbers of the bills of lading, and the numbers of the poods, amounting in all to 156,580 poods.

I assume that a similar indemnity was given in respect of the 30,280 poods, or, at any rate, that the same conditions applied to the release of the proceeds of this parcel.

Later in the proceedings, by consent of the Procurator-General, orders were made authorising the Marshal to pay out to the solicitors for the Russian Bank the net proceeds of sale of the 30,280 and 156,580 poods of barley, less certain sums which were retained until the question of freight and expenses was decided.

Pursuant to such order two sums of 2,500*l.* and 11,000*l.* (making 13,500*l.*) were paid out to the Russian Bank out of the proceeds of the sale of the cargo, leaving in Court a sum of about 1,500*l.* (the balance of the proceeds) until the questions now in dispute were determined.

*R. A. Wright*, for the Russian Bank for Foreign Trade.—Under the common law rule no freight would be due. The *Iolo* being a British ship with goods on board consigned to Hamburg, as soon as war broke out it became illegal for the shipowners to carry the goods to their destination, and the contract of affreightment was at an end. Under the bills of lading freight

was due on delivery of the goods at Hamburg. This condition was not fulfilled, and there must be complete performance before the shipowners are entitled to freight—see *METCALFE v. BRITANNIA IRONWORKS Co.* [1877] (46 L. J. Q.B. 443; 2 Q.B. D. 423). In a precisely similar case, tried in the King's Bench Division, Rowlatt, J., decided that neither the full freight nor freight *pro rata itineris* was payable—*ST. ENOCH SHIPPING CO., LIM. v. PHOSPHATE MINING Co.* [1915] (W. N. 197; *Lloyds List*, April 29, 1915). It is not sufficient answer to say that the shipowners carried the cargo to a port relatively near Hamburg, as in *THE TEUTONIA* [1872] (41 L. J. Adm. 57; L. R. 4 P.C. 171), for in that case, under the contract, the ship did not have to go to a named port as in the present case, but merely to a safe port to be named by the charterers—see also *OGDEN v. GRAHAM* [1861] (31 L. J. Q.B. 26; 1 B. & S. 773) and *Carver's Carriage by Sea* (5th ed.), s. 238.

This is the first case in which the Prize Court has been concerned with questions of freight in connection with a British ship carrying innocent goods. In *THE JUNO* (*ante*, p. 151) the question was as to payment of freight out of the proceeds of sale of condemned goods, and the Court had no "concern . . . with the contracts between the shipowners and the shippers or cargo owners" (*ante*, p. 160). In the present case the Court is concerned with the contract, the dispute being between the cargo owners and shipowners, and on the contract the cargo owners are entitled to the proceeds of the goods without deduction for freight.

*Roche, K.C.*, and *W. N. Raeburn*, for the shipowners.—It must not be assumed that, because the goods were released to the claimants, they were necessarily innocent goods. The goods were released to allies, and it has not been proved that they were released as of right, because the property in them was in the claimants; and further, the release was subject to the indemnity to pay freight. The general principle that at common law no freight is payable unless the goods are carried to their port of destination is admitted, but different principles prevail in the Prize Court—*THE JUNO* (*ante*, p. 151) and *THE CORSICAN PRINCE* (*ante*, p. 178). Further, there was a particular contract in this case by which an alternative method of performance was provided. By the bill of lading, "in case of blockade or interdict of the port of discharge, or if the entering of or discharging

in the port shall be considered by the master unsafe by reason of war disturbances or ice, the master may land the goods at the nearest safe and convenient port at the expense and risk of the owners of the goods. . . .”

This brings the case within the principles laid down in *THE TEUTONIA* (41 L. J. Adm. 57; L. R. 4 P.C. 171); see also *WAUGH v. MORRIS* [1873] (42 L. J. Q.B. 57; L. R. 8 Q.B. 202) as to the non-avoidance of an illegal contract where there is an alternative method by which it can be carried out without violating the law. The port to which the *Iolo* went was the “nearest safe and convenient port.” The master accepted the advice of the Admiralty and landed the cargo at Barry, which was a convenient port and the nearest safe port to Hamburg.

*H. Stranger*, for the Procurator-General.—In *THE JUNO* (*ante*, p. 151) the vessel could not proceed to the port of destination because she had enemy cargo on board. In the present case the *Iolo* could not proceed because she had an enemy destination. The principle is the same, and while entitled to some freight in accordance with the decision in *THE JUNO* (*ante*, p. 151), the shipowners’ claim in respect of expenses and detention at Portishead should be disallowed.

*R. A. Wright*, in reply.—The indemnity given by the Russian Bank was the result of a compromise whereby the goods were treated as innocent goods, and the case, therefore, is identical with *ST. ENOCH SHIPPING CO., LIM. v. PHOSPHATE MINING CO.* ([1915] W. N. 197; *Lloyds List*, April 29, 1915), except for the “blockade and interdict” clause in the bill of lading. But the object of that clause was merely to put an end to the shipowner’s responsibility by providing an alternative method of delivery. If it were intended that under that alternative method the shipowners were entitled to freight, some words should have been added altering the governing part of the contract with regard to payment of the lump sum freight on delivery at Hamburg.

The “blockade and interdict” clause is inapplicable where the whole contract has become impossible of performance *in medio*. The shipowners in fact never purported to act under that clause, but treated the voyage as at an end. On the effect of the outbreak of war on contracts of affreightment, see *ARNHOLD KARBURG & CO. v. BLYTHE, GREEN, JOURDAN & CO.* ([1915] 2 K.B. 379), *per* Scrutton, J., at p. 389, quoting from

the judgment of Willes, J., in *ESPOSITO v. BOWDEN* [1857] (7 E. & B., at p. 783).

[*Roche, K.C.*, referred to *SANDAY & Co. v. BRITISH AND FOREIGN MARINE INSURANCE Co.* [1915] (2 K.B. 781).]

*Cur. adv. vult.*

*June 7.*—SIR SAMUEL EVANS (THE PRESIDENT).—Having stated the facts set out above, the learned Judge proceeded: It has been necessary to set out the above facts in order that the circumstances in which the Russian Bank made the present application may be understood. Counsel for the bank contended that they were entitled to be paid out the balance of the proceeds of the sale of the barley in full, without any deduction for freight or any other charges.

The foundation of his contention was that in law the contract between the shipowners and the bank, as owners of cargo, had come to an end, because the goods were not delivered in the port of Hamburg in accordance with the contract contained in the bill of lading, and that the shipowners were not legally entitled to recover the freight or any part thereof, or to any lien therefor, or to any allowance in respect of it.

But before proceeding to say anything about the legal questions which were argued, I must point out that, in the view I take of the facts, there are difficulties in the way of the bank's claim which appear to be insuperable.

In the first place, counsel for the bank assumed that his clients were in the position of absolute owners of the cargo entitled to say that the seizure was wrongful, and that their claim must be considered without any reference to the seizure as prize, or to the sale or to the prize proceedings or to the terms on which the consent to the release of the proceeds of the sale was given. The argument was directed as if the question was merely one between the bank and the shipowners, and dependent only upon the contract contained in the charterparty.

The same bank were interested in a cargo shipped and seized in very similar circumstances in the case of *THE CORSICAN PRINCE* (*ante*, p. 178), which came before this Court in February last, and I venture to repeat what I said in that case upon the question of release by the Crown, as follows:

"The Crown has full right to consent to the release of any ship or goods captured or seized on any grounds that to the

Crown may seem fit. Moreover, it does not by any means follow as a necessary consequence of the release that the goods were not properly seized as prize as the Crown's droits of Admiralty. In the present case, as the Empire of Russia is our ally in the war, it does not require a very vivid imagination to conceive grounds for giving up to the Russian Bank the proceeds of the portion of the cargo claimed by them, quite other than an acknowledgment of wrongful seizure. And if it be thought material, it would be quite open to any one interested in these proceedings to allege and to set out to prove that the seizure of the cargo was lawful" (*ante*, p. 187).

I will add that if it had been thought material in the interest of the bank in the present case, it would have been quite open to any one interested in the proceedings to allege and to set out to prove, if they could, that the seizure of the cargo was unlawful, and that they were absolutely entitled according to prize law to have the cargo released, with or without costs and expenses.

That task they did not undertake. The course they were advised to take, and which they may have taken with much prudence, was to accept the release of the net proceeds of the sale of the goods upon the terms of the indemnity hereinbefore set out. These terms shew clearly that the arrangement was a compromise, and that it was by no means admitted that the Russian Bank were entitled as of right to the cargo or its proceeds.

I need hardly say that according to the rules and practice of this Court the Marshal rightly acted when he undertook to pay to the shipowners the "ascertained" freight and charges, by which I think was meant the proper amount of freight and charges to be ascertained by a reference to the Registrar and Merchants in accordance with the principles which have been laid down for the purpose.

These payments have in part been made, and will at the end be made in full, out of the proceeds in Court, and are covered by the wide words of the indemnity.

Upon these facts I am of opinion that the Russian Bank are not entitled to be paid in full without any reduction for freight and expenses.

But, lest my view of the result of the facts may be considered to be erroneous, and as the legal aspect of the case, and of

cases similar to it, is of general importance, I will deal also with the law applicable to such cases. I can do this the more briefly because I have already had occasion to deal with the subject in some of its aspects in *THE JUNO* (*ante*, p. 151) and *THE CORSICAN PRINCE* (*ante*, p. 178).

The former dealt with the freight claimed by owners of a British ship (in respect of goods which were laden upon her and which were condemned as prize) as against the captors; and the respective positions of British ships and neutral ships in relation to their rights to freight in such cases were compared.

In the latter I considered the general question of the jurisdiction of the Prize Court to award freight to owners of British ships where the cargo was seized as prize and where it, or its proceeds, had been released, as in the present case.

In order to avoid repetition I would refer to the authorities cited in those two decisions. From them I deduced certain results and ventured to lay down the following propositions:

“The Prize Courts have constantly dealt with claims for freight and damages where ships or cargoes have been captured or seized, not only as between captors and owners, but also as between owners of ships and owners of cargo; and have adjudicated upon such claims whether the ship or cargo had been released, and when both ship and cargo had been released; and apparently no actions involving those questions in similar cases were brought in any common law Court.

“And this is obviously for grounds solid in justice, and convenient in practice, because the two Courts administer two different codes or systems of law: the Prize Courts deal with claims in accordance with the law of nations, and upon equitable principles freed from contracts, which almost always cease to have effect upon capture or seizure by reason of the non-performance or non-completion of the contract of affreightment; whereas common law Courts would only determine the consequences of the strictly legal contractual obligations of the parties.

“The King’s Bench Courts would either give the claimants for freight the whole or nothing, according to whether the contract of affreightment had been performed or not. But the Prize Court takes all the circumstances into consideration, and may award, as it has done in decided cases, the whole or a moiety of the freight, or a sum *pro rata itineris*; or it may

discard the contract rate altogether even as a basis for assessment on calculation—*vide* THE TWILLING RIGET [1804] (5 C. Rob. 82; 1 Eng. P.C. 430)—or it may withhold or diminish the sum by reason of misconduct, as, for example, by resistance to search, or spoliation or non-disclosure of papers.” [THE CORSICAN PRINCE (*ante*, at p. 185).]

A passing reference was made in the judgment given in THE JUNO (*ante*, p. 151) to the case of THE FRIENDS [1810] (Edw. 246; 2 Eng. P.C. 48). It was not dealt with at length because, as was pointed out, it was between shipowners and cargo owners, and not between shipowners and captors, as was that of THE JUNO (*ante*, p. 151). That very circumstance renders the decision in THE FRIENDS (Edw. 246; 2 Eng. P.C. 48) of great importance in the consideration of the matter now before the Court. It is right therefore to refer to it more fully.

It was the case of a British vessel which had been chartered to deliver a cargo at Lisbon. The ship had prosecuted her voyage to the entrance of the Tagus, when she was warned off by the blockading squadron. A gale of wind afterwards blew her out to sea, and she was captured by a Spanish privateer, but was soon afterwards re-captured by a British cruiser and taken to Madeira, where the ship and cargo were sold by the re-captors to pay salvage. The ship and cargo were afterwards decreed to be restored.

The question the Court had to decide was what freight was due in the circumstances. On the part of the owner of the ship it was contended that the whole of the freight was due, as the ship had actually gone up to the mouth of the port to which she was destined. On the part of the owner of the cargo it was contended that no freight was due, as the cargo was not delivered according to the terms of the charterparty.

Referring to certain cases of American ships bound to France or Holland, and which were brought into this country under the prohibitory law, Lord Stowell said:

“In those cases the Court gave the master the full benefit of the freight, not by virtue of his contract, because, looking at the charter-party in the same point of view as the Court of common law, it could not say that the delivery at a port in England was a specific performance of its terms. But, there being no contract which applied to the existing state of facts,



the Court found itself under an obligation to discover what was the relative equity between the parties. This Court sits no more than the Courts of common law do to make contracts between parties; but, as a Court exercising an equitable jurisdiction, it considers itself bound to provide as well as it can for that relation of interests which has unexpectedly taken place under a state of facts out of the contemplation of the contracting parties in the course of the transaction."

And in pronouncing his decision in the case of *THE FRIENDS* (Edw. 246; 2 Eng. P.C. 48) he delivered himself as follows:

"The present case is marked with peculiar misfortune, because here, after the ship had been stopped by the blockading force, she was blown out to sea, and being subsequently taken out of the hands of the master, she was carried by the re-captors to a distant port, and there sold, together with her cargo, at a great loss. In this case, therefore, loss is unavoidable, and the only question is upon whom the weight of it shall fall. Now, if the incapacity of completing the voyage could be exclusively attributed to one of the parties, it would be proper that the loss should fall there; but the fact is that the calamity is common to both, for both ship and cargo were equally affected by the blockade. The ship could not have entered the interdicted port in ballast, any more than the cargo could have entered it in any other vehicle. The loss arises from the common incapacity of the one and of the other; I think, therefore, that what equity would suggest is that the loss should be divided; and, under these circumstances, I shall direct a moiety of the freight to be paid" (Edw. 248; 2 Eng. P.C. 49).

In the case which now falls for decision in this Court the cargo in question was seized as prize, and its proceeds were paid into Court to be dealt with in the prize proceedings.

I have pointed out that, according to the authorities and practice of the Court of Prize, the jurisdiction of the Court to deal with freight is not affected by the release of the cargo, even if it had been released upon the decision of the Court that it had been wrongfully seized, which was not the case in relation to this cargo.

According to the common law, the contract of affreightment came to an end immediately it became illegal because of the

war to proceed to carry the goods to their German destination, and in a Court of common law no freight could be recovered under the contract which had so come to an end.

An illustration of this is afforded by the recent judgment of Mr. Justice Rowlatt in *ST. ENOCH SHIPPING CO., LIM. v. PHOSPHATE MINING CO.* ([1915] W. N. 197; *Lloyds List*, April 29, 1915), where the learned Judge decided that no payment could be recovered by the shipowners for the carriage of cargoes of cotton, copper, phosphate, and wheat from South America which were destined for Hamburg, but which were diverted to Manchester.

It must be noted in connection with this decision that, although the cargoes were in some way detained by the Customs authorities, no proceedings in prize were taken. The cargoes were given back as if they never had been interfered with by the Customs authorities, and the case was dealt with upon the footing that no seizure as prize was ever effected.

I may be allowed to point out that the decision in that case, although I doubt not it was given in accordance with the law of contract, might fairly be considered commercially as producing a hardship to the shipowners.

On the other hand, it is satisfactory to note that if my view of the doctrines to be applied in such cases when they come before the Prize Court is correct, a more even and equitable adjustment can be made, which balances fairly the rights of the parties, where the contract which has been ended no longer regulates them.

Upon the grounds on which my decision is based it becomes unnecessary for me to decide the various questions which were argued upon the construction of the bill of lading and the effect of the "blockade and interdicted port" clause.

In my judgment the application of the Russian Bank for payment of the proceeds in full without any deduction for freight or charges fails, and I dismiss their summons with costs.

Counsel for the shipowner did not contend in these proceedings that they were entitled to the full freight as the contract freight. In one sense it was not necessary upon this application to argue that point. But I do not apprehend that it is desired to argue it further. And so, it may be convenient now to order that it be referred to the Registrar and Merchants to ascertain

the amount due for freight or charges in respect of all the cargoes upon the principles laid down in the judgment of this Court in *THE JUNO* (*ante*, p. 151).

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*Solicitors*—Coward & Hawksley, Sons & Chance; Botterell & Roche; Treasury Solicitor.

[*Reported by E. C. Trehern, Esq., Barrister-at-Law.*]

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[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). June 14, 1915.

THE BELGIA.

*German Ship—Deviation to Avoid Capture by French—Refusal to Admit to British Port—Outbreak of War between Great Britain and Germany—Subsequent Capture—At Sea or in Port—Entering Port for other than Commercial Purposes—Hague Conference, 1907, Convention VI. arts. 1 and 2.*

On August 3, 1914, a German liner bound from New York to Hamburg, having heard by wireless that war had broken out between France and Germany, deviated to the Bristol Channel, and on the afternoon of August 4 arrived off Newport (Mon.), not—as was suggested by her master—to get coal, but to avoid possible capture by French warships in the English Channel, and to get instructions from her owners. War between Great Britain and Germany being imminent, and fearing that damage might be intended to the docks, the port authorities refused the vessel admission and directed her to an anchorage further out in the channel. Early next morning, a state of war having existed between Great Britain and Germany since eleven o'clock on the previous evening, the vessel was boarded by port officials with an armed escort and brought into Newport.

The Crown claimed that the vessel was captured at sea and was liable to condemnation. The owners claimed that she was seized in port, or while entering port, and was only subject to detention during the period of the war:—Held, that the vessel was captured at sea, and not in port or whilst entering port, and

therefore she was not entitled to the protection afforded by article 1 of the Sixth Hague Convention, and must be condemned.

Quære, whether a vessel which is not entering a port for commercial purposes, but to avoid possible capture, is protected from confiscation under articles 1 and 2 of the Sixth Hague Convention.

Cause for the condemnation of ship as prize.

On August 3, 1914, the *Belgia*, a screw steamship of 8,132 tons gross, belonging to the Hamburg-Amerika line, when off the Scillies in the course of her voyage from New York and Boston to Hamburg, heard by wireless that war had broken out between France and Germany, and her master decided to make for the Bristol Channel to avoid possible capture by French warships, and also to get instructions from his owners. He picked up a Newport pilot, and on the afternoon of August 4 arrived off Newport. War being then imminent between Great Britain and Germany, the military and port authorities, thinking that the *Belgia* might be an armed German liner with hostile designs on the port, decided to refuse her admission.

The subsequent events which culminated in the seizure of the vessel, according to the affidavit of the dockmaster at Newport, were as follows:

"At about 4.30 P.M. I proceeded out in a tug, and when the *Belgia* was near the Bell buoy I hailed her to stop or she would be fired on, as the port was then only being used for Admiralty purposes. She accordingly stopped and anchored, and I went on board. I asked the Captain why he wished to come to Newport. The Captain replied that he was from Boston short of coal, and was unable to get to his destination—Hamburg—and that the Newport pilot had told him that he could get good coal at Newport and could dock there. Shortly afterwards the officer in command of the Severn Defences accompanied by Customs officers came out. The coal in the *Belgia* was then measured and it was found that there were about 350 tons in the bunkers. The master of the *Belgia* told me that the ship could steam  $13\frac{1}{2}$  knots on eighty tons per day. Hamburg is only about 843 miles from Newport. There was sufficient coal on board to steam over 1,400 miles. The *Belgia* afterwards anchored off the English and Welsh Lightship (which is over 5 miles outside the Bell buoy).

"About 1 A.M. on the 4th, after war with Germany was declared, the Collector of Customs telephoned . . . that he was placing at my disposal a sufficient force of police and military to take off in the tug and arrest the *Belgia* . . . I sent the tug with a letter to the captain and pilot of the *Belgia* inquiring whether the vessel was still at anchor in the position which I indicated and telling him (*sic*) to have steam ready to proceed to Newport, and that definite instructions would be sent off later. . . . I did so because I thought that the captain might decide to go down channel and try to make Hamburg. These instructions were delivered, and had the desired effect on the captain (as he afterwards told me) of causing him not to move the vessel.

"At about 3.45 A.M. I went out in a tug to the *Belgia* with the Chief Constable and 12 men armed with rifles and the Customs officers. The position of the *Belgia* was then as follows: The English and Welsh Light vessel bearing about E.S.E. three-quarters of a mile, and the Spit lay about N.E. 1 mile. She was therefore  $3\frac{1}{4}$  miles from the Somersetshire coast and 5 miles from the Bell buoy (marking the mouth of the River Usk). . . . I told the master of the *Belgia* that war had been declared between Great Britain and Germany at midnight, that resistance was useless . . . and that he could not get the vessel out of the channel if he wanted to. I suggested that he should surrender and allow us to take charge of the vessel quietly . . . and the master agreed to our demand. I then told the master that I would put my own engineers in the engine room and this I did . . . I went on the navigation bridge—advising the pilot—to proceed with the vessel to Newport. The *Belgia* was in this way taken into Newport, and was safely moored in dock at about 6.40 A.M. The Chief Constable then took the armed police out of the tug and placed them on board the *Belgia*."

According to the affidavit of the Surveyor of Customs, the ship "was seized as prize . . . to the use of His Majesty in the said port on the 5th day of August, 1914"; and the claim on the writ, dated August 13, was for a decree of confiscation of the *Belgia* "seized *at sea* by the officer of His Majesty's Customs at the Port of Newport," the words "at sea" being added by an amendment of later date.

*Aspinall, K.C., and C. R. Dunlop*, for the Procurator-General.—The *Belgia* was captured at sea and not in port or

whilst entering port. The language in the affidavit and in the original indorsement on the writ is accounted for by reason of the fact that the Customs authorities did not fully appreciate the meaning of prize terms in the early stages of the war, when there was considerable doubt about the law of detention and capture. But it is a question of fact as to where the vessel was captured, and the master admits that he was seized in the place where he was anchored, which was more than two miles away from Newport and at sea. The vessel is therefore subject to condemnation, as article 3 of the Sixth Hague Convention, which exempts enemy vessels captured at sea in ignorance of the outbreak of hostilities, has no application to German vessels.

*Leck, K.C.*, and *Arthur Pritchard*, for the claimants, the owners of the vessel.—The *Belgia* was within the limits of the port of Newport when seized; and the authorities—as appears from the earlier documents in the case—were of that opinion. The word “port,” in an international convention, has not the same narrow meaning as in a charterparty or other commercial document, and should be given the widest interpretation. The port authorities exercised jurisdiction over the whole of the waters outside Newport, including the spot where the *Belgia* is alleged to have been captured. The harbourmaster exercised his jurisdiction by pointing out where the *Belgia* was to anchor, and the space of water over which port discipline is exercised is part of the port: see the observations of Brett, M.R., in *GARSTON & Co. v. HICKIE* [1885] (15 Q.B. D. 580, at p. 590). Further, all the acts of detention took place within the limits of the fiscal port as defined by the Order of December 28, 1847, constituting Newport a port, and published in the *London Gazette* of January 4, 1848.

But it is not necessary to prove that the seizure of the vessel took place “in” the port. It is sufficient to satisfy the provisions of article 1 of the Sixth Hague Convention if she was “entering” the port; and she was a vessel which could be properly described as “entering the port of Newport” when she arrived off the port on August 4, and she continued to be a vessel “entering” the port until she was in fact taken there by the harbourmaster on the following morning.

*Aspinall, K.C.*, in reply.—The *Belgia* was captured at sea, and it is immaterial whether she was within the fiscal port or not—

THE MÖWE (*ante*, p. 60; [1915] P. 1). Further, the *Belgia* was not entering the port for commercial purposes at all, and, as the preamble to the Sixth Hague Convention shews, the object of the convention is to insure the security of international commerce; articles 1 and 2, therefore, have no application to the case of a vessel coming to a port to avoid capture and being refused admission to the port.

SIR SAMUEL EVANS (THE PRESIDENT).—The circumstances under which this vessel was captured have been fully stated to me, and I must decide the case in accordance with what was actually done, and not in accordance with any language, accurate or inaccurate, which may have been used by the laymen in and about the port of Newport at the time of the commencement of this war, when people were not familiar with the nomenclature, or with the provisions which one has made since.

I find, in fact, that this vessel was captured at sea after the outbreak of hostilities—that is to say, about four o'clock in the morning, at the place which is approximately marked on the chart before me, and which is described in the affidavit of the dockmaster as follows: "The English and Welsh Light vessel bearing about E.S.E. three-quarters of a mile, and the Spit lay about N.E. 1 mile. She was therefore  $3\frac{3}{4}$  miles from the Somersetshire coast and 5 miles from the Bell buoy (marking the mouth of the river Usk)." Being captured there and in these circumstances, I have come to the conclusion that she was captured at sea. If that is right, I need not trouble at all about the Hague Convention No. VI. articles 1 and 2; but in deference to the argument of counsel for the claimants I will say a word or two about them.

I have grave doubt whether this was a vessel which was intended to be protected by that convention under the circumstances in which she was placed at the time of her capture. The preamble to the convention is this: "The contracting parties, anxious to insure the security of international commerce against the surprises of war, and wishing, in accordance with modern practice, to protect as far as possible operations undertaken in good faith and in process of being carried out before the outbreak of hostilities have resolved to conclude a Convention to this effect." Germany was a party to that convention subject to certain reservations—namely, article 3 and

part of article 4. Article 1 deals with this case. It deals with the case of a vessel already in port at the time of the outbreak of hostilities, and deals also with the case of a ship which has left its last port of departure before the commencement of the war, and is entering a port belonging to the enemy while still ignorant that hostilities have broken out. In my opinion this vessel was not for the purpose of commerce at all, entering this port, or intending to enter this port. I do not believe the story of the captain of the *Belgia* that he intended to supply himself with coal. That was his excuse for coming there. He wanted to get into a place where he might be free from possible capture by French cruisers, and to get instructions from his Government.

However that may be, I am clearly of opinion that this vessel had not entered, and was not entering, this port at the time of the capture within the meaning of article 1.

I have already said in *THE MÖWE* (*ante*, p. 60; [1915] P. 1) what, in my view, is the meaning of "port" whenever that word is used in this article, and I will not repeat it. But even if the proper meaning to be attached to the word "port" in this article was "fiscal port," I am not at all satisfied that the *Belgia* was captured while within the limits of the fiscal port. It must be proved by those who rely on it, and counsel for the claimants have not satisfied me by reference to the plans that this place was within the fiscal port. That is wholly unimportant, because she was not captured in entering the port; she was captured at sea, and is not entitled to the protection afforded to commercial vessels engaged in the exercise of their commerce under article 1 of Convention VI. Therefore she was a vessel subject to condemnation. Her nationality is beyond dispute, and I decree her condemnation and sale.

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*Solicitors*—Treasury Solicitor; Pritchard & Sons.

[*Reported by E. C. Trehern, Esq., Barrister-at-Law.*

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## [ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). June 9, 14, 21, 1915.

## THE ZAMORA.

*Neutral Cargo—Contraband—Requisition by Crown—Preservation in Specie—Order in Council of April 29, 1915—Order XXIX. of Prize Court Rules—Validity—Right of Angary.*

*The provisions of Order XXIX. rule 1 of the Prize Court Rules, authorised by an Order in Council of April 29, 1915, whereby a ship [or goods] which the Crown desires to requisition, and in respect of which no final decree of condemnation has been made, after appraisement, and upon an undertaking to pay the appraised value into Court, can be ordered by the Judge to be released and delivered to the Crown, do not violate the law of nations by reason of the fact that they are applicable to neutral ships and goods, and the Prize Court has the jurisdiction and the duty to give effect to them.*

*Claimants to property captured or seized as prize cannot demand by any rule of international law that the property shall be preserved in specie until the final decree determines whether it is to be released or condemned.*

*A neutral vessel, laden with a cargo of copper owned by neutrals and consigned to a neutral port, was captured by a British warship and brought into port as prize on the ground that the copper, a commodity placed by Great Britain on the absolute contraband list, had an ultimate enemy destination; and a writ in prize was subsequently issued claiming the condemnation of both ship and cargo. Before the hearing of the condemnation suit, the Procurator-General took out a summons for an order that part of the copper should be released to the Crown in accordance with the terms of the above Order.*

*Ordered, that the copper, after appraisement and an undertaking to pay the appraised value into Court in accordance with rule 5 of the Order, should be delivered up to the Crown as prayed by the summons.*

Summons adjourned into Court for argument.

The following statement of facts is taken from the judgment:  
 “By a summons issued in an action in prize relating to the

s.s. *Zamora* and her cargo, an application was made by the Procurator-General for an interlocutory order that part of the cargo laden in the vessel—namely, about 400 tons of copper—should be released and delivered up to the Crown under Order XXIX. of the Prize Court Rules, upon an undertaking to be given by the proper officer of the Crown to pay into Court the appraised value of the copper in accordance with rule 5 of the Order.

“The claim in the writ in the prize proceedings was: ‘For a decree that the said steamship *Zamora* be condemned and confiscated as good and lawful prize, on the ground that the cargo which she was carrying at the time of her capture and seizure was as to more than one-half thereof contraband of war, and for a decree that the said cargo be condemned as good and lawful prize as contraband of war; or in the alternative for an order for the detention and/or for the sale of the said cargo, on the ground that the said steamship sailed from a port other than a German port after March 1, 1915, having on board the said cargo, which had an enemy destination or was enemy property.’”<sup>1</sup>

“The *Zamora* was a Swedish vessel registered at Stockholm. She sailed from New York, U.S.A., on March 20, 1915, bound for Stockholm.” [She had on board (*inter alia*) 400 tons of copper shipped by the American Smelting and Refining Co. and consigned to the Swedish Trading Co. of Stockholm. Copper, by an Order in Council of October 29, 1914, had been put on the absolute contraband list, and on April 8, when between the Faroes and the Shetlands, the *Zamora* was stopped and captured by His Majesty’s ship *Alsatian*, and a prize crew was put on board.] “She was taken to the Orkney Islands, and was, with the cargo, finally handed over to the Marshal of this Court on April 19. Thenceforth the ship and cargo remained

(1) By an Order in Council framing “Reprisals for Restricting further the Commerce of Germany,” dated March 11, 1915, it was (*inter alia*) provided (iv.) that “Every merchant vessel which sailed from a port other than a German port after March 1, 1915, having on board goods which are of enemy origin or are enemy property may be required to discharge such goods in a British or allied port. Goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and, if not requisitioned for the use of His Majesty, shall be detained or sold under the direction of the Prize Court. The proceeds of goods so sold shall be paid into Court and dealt with in such manner as the Court may in the circumstances deem to be just.”

in the custody of the Marshal of the Prize Court awaiting the hearing of the cause upon the judgment in which their condemnation or release depended.

"In support of the present application for the release and delivery of the cargo to the Crown, a sufficient affidavit of the Director of Army Contracts was filed. The application was strenuously resisted on behalf of a Swedish firm, who claim to be the owners of the cargo. The summons came before me in chambers, and, at the request of counsel for the claimants, I ordered that it be adjourned into Court for argument."

Order XXIX. was a new Order revoking Order XXIX. authorised by an Order in Council of November 28, 1914 [under which the case *THE ANTARES* (*ante*, p. 261; 31 *Times L. R.* 290) was decided].

The present Order was made under an Order in Council of April 29, 1915, prescribing as "Statutory Rules," the amendments made by "Provisional" Order in Council of March 23, 1915, in the Prize Court Rules, 1914.

The Order in Council recites that, "whereas by section 3 of the Prize Courts Act, 1894, His Majesty in Council is authorised to make Rules of Court for regulating, subject to the provisions of the Naval Prize Act, 1864, and the said Act, the procedure and practice of Prize Courts within the meaning of the Naval Prize Act, 1864, . . . Now, therefore, His Majesty, by virtue of the powers in this behalf by the said Act or otherwise in Him vested, is pleased, by and with the advice of His Privy Council, to order . . . that Order XXIX. (Requisition by Admiralty) of the said Rules [The Prize Court Rules, 1914], as amended by His Majesty's Order in Council dated 28 Nov., 1914, shall be, and the same is hereby revoked, and in lieu thereof the following Order shall have effect:

"(1) Where it is made to appear to the Judge on the application of the proper Officer of the Crown that it is desired to requisition on behalf of His Majesty a ship in respect of which no final decree of condemnation has been made, he shall order that the ship shall be appraised, and that upon an undertaking being given in accordance with Rule 5 of this Order the ship shall be released and delivered to the Crown.

"(5) In every case of requisition under this Order an undertaking in writing shall be filed by the proper Officer for the Crown for payment into Court on behalf of the Crown of the appraised value of the ship. . . ."

By Order I. rule 2: "unless the contrary intention appears the provisions of these rules relative to ships shall extend and apply, *mutatis mutandis*, to goods."

*The Attorney-General (Sir Edward Carson, K.C.) and Branson, for the Procurator-General.*—If the goods were not in the custody of the Prize Court, the Crown, as an executive act, could take possession of them; being in the possession of the Court an order of the Court is necessary, as the Crown could not take them without possibility of conflict between the officers of the Court and the Executive; but that does not affect the general right of the Crown to seize this property for the defence of the realm in the same way as the property of British subjects could be seized. It is a concession to the owners of cargo that, as a condition to its release to the Crown, its value should be secured to them in the event of it being proved that the cargo was not contraband.

As regards the contention, which it is understood that the claimants will raise, that the Order is *ultra vires*, it is not open to any one to contend that an act done by the Executive in the defence of the realm is *ultra vires*; if the subjects of a foreign country desire to raise that question they must apply to the Foreign Office. There is no case in which a neutral has challenged the validity of an Order in Council, or in which a Prize Court has not acted upon an Order in Council, and the requisitioning order should be made.

*Leslie Scott, K.C., Roche, K.C., R. H. Balloch, and T. Baty, for the claimants.*—It is not contended that an executive act is *ultra vires*, but that, under the law which binds the Prize Court, the Court has no jurisdiction to perform the judicial act which is demanded by the Crown, because the act would be contrary to the law of the Prize Court, to justice, and to the rules of international equity.

So far as the present proceedings are concerned the Court must deal with the question on the footing that the goods are owned by neutrals and are not bound to a contraband destination. Further, as appears from the affidavit filed on behalf of the claimants, the exportation of copper from Sweden was prohibited, and the claimants, in addition, are willing to undertake that it shall not in any shape or form, directly or indirectly, be re-shipped to any country at war with Great Britain.

It is admitted that in Order XXIX. the word "ship" includes cargo: *THE ANTARES* (*ante*, p. 261; 31 Times L. R. 290) decided under the former Order XXIX.; but if it is contended that the Order gives power to the Court to transfer neutral property taken on the high seas to the Crown by way of compulsory purchase, the Order is not binding on the Prize Court, because it alters the substantive law of the Court regulating the rights of neutrals to their property on the high seas when no charge of contraband has been established. The words in the operative part of the Order in Council of April 29, "Now, therefore, His Majesty by virtue of the powers in this behalf by the said Act *or otherwise* in him vested," do not mean "by this Act or by the Royal Prerogative," and do not give the Crown power to change the substantive law. The Order in Council is not an exercise of the Royal prerogative, and the contention that the substantive law can be changed by the Royal prerogative constitutionally cannot be supported.

By section 3 of the Prize Court Act, 1894, the Crown in Council is authorised to make Rules of Court for regulating, subject to the provisions of the Naval Prize Act, 1864, the procedure and practice of Prize Courts; and if it is contended that Order XXIX. gives the power of compulsory purchase and gives jurisdiction to a Judge of the Prize Court to enforce it, then, so far as the Order was made under the Prize Court Act, 1894, it is outside the power conferred on His Majesty in Council, and to that extent is void. An Act of Parliament authorising the making of rules in relation to practice and procedure does not authorise a change in the substantive law—*COOKNEY v. ANDERSON* [1863] (32 L. J. Ch. 427, at p. 430; 1 De G. J. & S. 365, at p. 384) and *THE A.-G. v. SILLEM* [1864] (33 L. J. Ex. 209; 10 H.L. 704); see also as to the meaning of "practice and procedure," *POYSER v. MINORS* [1881] (50 L. J. Q.B. 555, at p. 557; 7 Q.B. D. 329, at p. 333); and the words in the Order in Council "by virtue of the powers under the Act 'or otherwise,'" under any canon of construction should not be interpreted as including the exercise by the Crown of its prerogative rights.

The system of law administered by the Prize Court which, broadly speaking, is the law of nations—"The course of Admiralty and the law of nations"—*THE MARIA* [1799] (1 C. Rob. 340, at p. 349; 1 Eng. P.C., at p. 153) and *THE*

RECOVERY [1807] (6 C. Rob. 341, at p. 348)—does not recognise any such right as that of compulsory purchase—see the letter of 1794 by Sir William Scott and Dr. Nicholl to Mr. Jay, reported in *Story's Principles and Practice of Prize Courts*, at page 2. Not only was the right of requisitioning neutral property unknown to the law of nations, but the few provisions by statute and convention for pre-emption in certain limited cases afford strong evidence that no such general right is known, for the particular excludes the general.

Section 38 of the Naval Prize Act, 1864, gives a limited power to purchase naval or victualling stores on a foreign ship bound to an enemy port—that is, contraband of war; and article 19 of the Fifth Hague Convention authorises the requisitioning of railway material in case of absolute necessity, and subject to compensation. Similarly, article 29 of the Declaration of London permits the requisitioning of articles serving to aid the sick and wounded; and in the report of the Drafting Commission there is a considered and unanimous opinion of the international jurists who were parties to the report, as follows: "The articles in question must have . . . an enemy destination, otherwise the ordinary law regains its sway; a belligerent could not have the right of requisition as regards neutral vessels on the high seas." These instances are sufficient to shew that the rule of international law is that neutral property cannot be requisitioned.

A right of angary had been claimed in some cases in the past, but it was always limited to ships within the jurisdiction of the country exercising the power, and the requisition had to be for the purposes of transport. And a right to seize neutral goods was claimed by military leaders in the field, but only in the case of urgent military necessity—for example, British ships were seized in the Seine in the Franco-Prussian War, 1870.

The text writers on this subject may be divided into two categories—first, those writers who regard the doctrine of the right of angary as being confined to vessels or vehicles; and secondly, those who extend it further; and it is submitted that the balance of authority shews that the only rights recognised are the right of temporarily requisitioning ships and acts of urgent military necessity practised in the field—see *Phillimore* (3rd ed.), vol. iii. p. 49, s. 29; *Wheaton* (8th ed.), by Dana, s. 293; *Westlake*, vol. ii. p. 134; *Lawrence* (4th ed.), p. 626;

*Halleck* (4th ed), vol. i. p. 519; *Taylor*, 1902, p. 701; *Hautefeuille, Histoire, etc. du Droit Maritime International*, p. 439; *Calvo*, vol. iii. s. 1277; *Heffter* (4th ed.), pp. 356-7; *Risley* (1897 ed.), p. 139; *Oppenheim*, vol. ii. (2nd ed.), pp. 446-9; *Hall* (6th ed.), p. 741; *G. B. Davis' Elements of International Law* (1908 ed.), p. 439; *Holland's Letters on War and Neutrality*, p. 136; *Pitt Cobbett*, vol. ii. pp. 260 and 268.

It is inconceivable, if such a right as that claimed by the Crown ever existed in international law, that neither the Treaty of Paris nor the Hague Conventions dealt with it. There is not a single decision of the Prize Court of this country in which such a right is hinted at, and there is no justification for the application.

*Roche, K.C.*, following.—“A belligerent is, as a rule, not entitled to requisition neutral property on his own or enemy territory in order to make it serve warlike purposes”—see *The Laws of War* by Rikard Kleen, Minister Plenipotentiary, Membre de l'Institut de Droit International, Stockholm, 1909, p. 724. And even assuming that the right of angary exists, no text writer has suggested that it applies to a case like the present, where no urgent military necessity exists. The rule under which the Crown's application is made is rule 1—not rule 3, under which, in cases of urgent necessity, the Court can make the requisitioning order without previous appraisalment of the property. The rules in this Order can be given a lawful meaning and scope independently of the requisitioning of the property of neutrals on the high seas—for example, British ships for transport service, British goods which are subject to the statutory right of requisition, or enemy goods which are in this country.

[SIR SAMUEL EVANS (THE PRESIDENT).—What do you say with regard to the case of the sale of perishable goods?]

There is a distinction between the two cases. Being in the hands of the Court as custodian, perishable goods are *in medio* between the captors and the owners, and the Court has to exercise the functions of a good custodian, and is naturally given the right, if the goods cannot remain without deteriorating until the cause is determined, of directing a sale and substituting money for the goods. In the case of the sale of perishable goods the claimant can bid for and buy them, and the fund remains *in medio* to abide the result of the action. In the case of a requisition the Court awards the goods—which the

claimants want and might get, as they are not perishable—to the other party to the suit before the hearing. It is a proceeding on the principle of verdict first and trial afterwards. Sentences of Courts of Prize are conclusive against the whole world—*LOTHIAN v. HENDERSON* [1803] (3 B. & F. 499, *per* Lord Eldon at p. 545)—and that fortifies the conclusion that the Prize Court administers international law as recognised by the nations, and the order claimed by the Crown is unknown to such law. There is nothing contrary to that view in *THE FOX* [1811] (Edw. 311; 2 Eng. P.C. 62), which decided *prima facie* that Orders in Council were not deemed to be contrary to international law, and that in that particular case they were justified as reprisals.

[SIR SAMUEL EVANS (THE PRESIDENT).—In *MAISONNAIRE v. KEATING* [1815] (2 Gal. 324) Mr. Justice Story at p. 334 said: “. . . The legality of the conduct of the captors may, under circumstances, exclusively depend upon the ordinances of their own Government. If, for instance, the sovereign should by a special order authorise the capture of neutral property for a cause manifestly unfounded in the law of nations there can be no doubt that it would afford a complete justification of the captors in all tribunals of prize.”]

If it is suggested that that case lays down a broad doctrine, it would be contrary to principles recognised by Story, J., himself. The action was upon a bill of exchange for the ransom of a vessel, and the question was whether, by the law of nations, there was consideration for the bill. The whole point in the case was whether the capture—the act of seizure—was lawful, not necessarily as a capture which would result in condemnation, but as a seizure lawfully made according to the law of the captor's country.

In *THE FLAD OYEN* [1799] (1 C. Rob. 135; 1 Eng. P.C. 78), a case in which a British ship, after being condemned as prize by a French Consul at Bergen, Norway, was recaptured by the British, Lord Stowell said that it must be shewn that the condemnation was conformable to the usage and practice of the law of nations, and refused to recognise the sentence of a tribunal not existing in the belligerent country.

Assuming that it must be taken that Orders in Council are consistent with the law of nations, then it must be presumed that this Order in Council and the rules made thereunder are intended to be consistent with that law, and as a construction



can be given to the rules which is so consistent, that construction must be preferred.

*The Attorney-General* (Sir Edward Carson, K.C.), in reply.—The Crown are not asking for the condemnation of the ship, nor that the claimants should be deprived of the value of the cargo requisitioned. All that is asked for on this summons is, that, if in the opinion of the Crown the exigencies of the war and the defence of the realm require the requisitioning of this copper, then, on payment of the value, this should be allowed. It must be assumed that the goods are rightly here. They were not on the high seas, but within the jurisdiction, and *prima facie* were properly seized—see *THE ANTARES* (*ante*, p. 261; 31 Times L. R. 290).

This is the first time that an Order in Council has been questioned in the Prize Court. Do counsel for the claimants suggest that the King, who has the sole power of declaring war or neutrality, has no prerogative in this matter, and that in no circumstances—no matter what the need or danger to the realm—can neutral goods be requisitioned? They must go to that length; and no such proposition can be found in any of the authorities.

Orders in Council made under the prerogative of the Crown and under the Prize Court Act, 1894, would be binding on the Court even if they were not in accordance with international law. But it is not necessary to go to that length, because, once the right to requisition at all is conceded, the Court will not assume that the Crown will exercise the power wrongly. It is not for the Court, but for the Executive, to consider whether the requisite degree of emergency or necessity has arisen. The text writers lay down various principles, and those who are most against the doctrine of requisition merely say that it must only be enforced when there is an actual exigency of war.

In the present case it is not necessary to put the matter higher than that the Court should accept the Order as *prima facie* lawful until the contrary is shewn, and *MAISONNAIRE v. KEATING* (2 Gall. 324) and *THE INVINCIBLE* [1814] (2 Gall. 28, at p. 43) go further than that, and lay down that the Prize Court is bound by Orders made by the Sovereign in Council even if such Orders constitute a violation of neutral rights—see also *THE FOX* (Edw. 311; 2 Eng. P.C. 61). It is admitted by the claimants that the Court would be bound to administer section 38 of the Naval Prize Act, 1864, which has no more validity than an Order in Council made

under statutory authority and laid before both Houses of Parliament. Section 38 provides that where a ship of a foreign nation passing the seas laden with naval or victualling stores intended to be carried to an enemy port is brought into a port of the United Kingdom, and the purchase of the stores for the service of the Crown appears to the Lords of the Admiralty expedient without first proceeding to condemnation in a Prize Court, they may purchase all or any of the stores on the ship. But that section is directly opposed to the contention of the claimants that there is no foundation in international law for the requisitioning of neutral goods.

For a discussion of the whole question of Prize Court decisions as regards neutrals, see *Wheaton* (8th ed.), ss. 392-396.

[SIR SAMUEL EVANS (THE PRESIDENT) referred to THE SNIPE [1812] (Edw. 381).]

The claimants say that the Order of the Privy Council submitted to Parliament is *ultra vires* as being opposed to international law; but it is very difficult to lay down exactly what is international law in regard to the requisitioning of neutral property—see the observations by Alverstone, C.J., in *WEST RAND GOLD MINING CO. v. REGEM* [1905] (74 L. J. K.B. 753, at pp. 758 and 761; [1905] 2 K.B. 391, at pp. 401 and 407); and the fact that the claimants have quoted a number of text books, some in their favour and some against them, shews that there is no international law against which the Order in Council offends, and on which the Court can say that the Order has no binding force. The Fifth Hague Convention, with regard to the requisitioning of railway stock, does not shew that the right claimed is non-existent; it establishes the contrary, and sets up a limitation—"railway material coming from the territory of neutral powers . . . shall not be requisitioned . . . except in so far as is absolutely necessary." Further, there are many treaties in which it has been specifically provided that in the event of war the Governments would not seize the property of neutrals—for example, the treaty between Prussia and the United States of 1799 (art. 13), and between the United States and Venezuela of 1836 (art. 8).

SIR SAMUEL EVANS (THE PRESIDENT).—This is a summons which was issued on behalf of the Procurator-General in these prize proceedings asking for an order that 400 tons—or there-

abouts—of copper on the vessel *Zamora* should be released and delivered to the Crown after appraisalment, and upon an undertaking being given in accordance with the provisions of Order XXIX. as the Order stands under the Order in Council of April 29, 1915.

The summons came before me in chambers, and at the request of counsel for the claimants, who are subjects of neutral States, and upon their representation to me that the matter was one of great public and international importance, I adjourned the summons for argument into Court. The case has been most fully argued, and I have had the opportunity of listening to the argument and looking into the various authorities which were cited, between the day on which we last met and to-day, and I have heard the conclusion of the argument this morning.

I have come to a definite conclusion as to what the order ought to be, and I propose to make that order to-day, and to adopt the practice, which is often adopted by the Judicial Committee of the Privy Council, of stating my reasons at a subsequent date. As the matter is one of general importance, and as the case has been put before me most fully, I desire to give my reasons also fully and formally, and that I will do at the latest this day week.

I am clearly of opinion that I have the jurisdiction to make the order which is asked for in this summons under the provisions of Order XXIX. to which I have already referred, if it is made to appear to me on the application of the proper officer of the Crown that it is desired to requisition this copper on behalf of His Majesty.

I am clearly of opinion that Order XXIX. is a valid Order, and that it is entirely within my jurisdiction to act upon it, and that I should be failing in my duty if I did not act upon it. I accordingly make the order that these 400 tons of copper shall be released and delivered to the Crown after the copper has been appraised and upon an undertaking being given in accordance with rule 5 of Order XXIX. of the Prize Court Rules.

*June 21.*—SIR SAMUEL EVANS (THE PRESIDENT).—Having stated the facts set out above, the learned Judge proceeded: Upon the hearing it was contended that the provisions of Order XXIX. material to the present question violated the law of nations, were not binding upon this Court, and that this Court owed no obedience to them, and ought not to act under them.

The argument spread over a wide field. In the expanse of the outlook the matter really in issue was so dwarfed as to vanish almost out of sight. Before entering upon a survey of the extended area which was opened out in the argument I propose to deal with the more restricted position, in relation to which the decision of the question in issue depends.

The position is that prize proceedings resulting from the capture of the vessel and cargo are pending, and that the present application is for an interlocutory order in respect of the copper which was part of the captured property. Any order made upon the interlocutory application will not prejudice the case for the claimants upon the final hearing. It may be that their cargo will be decided to be confiscable, and will be decreed to be condemned. Or it may happen, on the other hand, that the decision will be the other way; in which case the claimants will have the value of the cargo decreed to be paid to them, and possibly, in addition, they may be awarded sums for damages and costs. The order made upon the present application will not affect their rights, which will fall to be determined at the hearing of the cause.

At the outset, the capture or seizure as prize vests the possession of the property captured or seized in the Crown, and when the property comes into the custody of the Marshal of this Court it is subjected fully to the jurisdiction of this Court. The Court has inherent powers to deal with the property brought within its jurisdiction as it may deem fit in the exercise of its discretion. It has, in my opinion, such a power, apart from any rules of practice made under the Prize Acts of 1864 or 1894. It could, without any such rules, order a sale of perishable goods before condemnation; or order a sale of goods in order to avoid difficulties or expense of warehousing, or removing, or for any other reason which appeared sufficient to the Court.

In my view persons who lay claim to property captured or seized, have no right by any rule of international law to demand that the property should be preserved *in specie* until the final decree determines whether it is to be released or to be condemned. Prize Courts have always acted upon the principle that the capture is lawful, until claimants establish the contrary. All that it is necessary for captors to allege in prize proceedings is that the capture was made, and that the property captured is claimed as prize; thereupon claimants must establish their

claim to release. If their claim to release is sustained they may have the property delivered up, if it has been kept intact; or they will receive its value if it has been sold or otherwise disposed of, with or without costs and damages against the captors as the circumstances may require.

The argument of counsel for the claimants was, or necessarily involved, that the goods captured must, in any circumstances, be preserved to be delivered up in the same character if release is ordered; and that they cannot, except with the consent of the claimants, be sold or converted into a fund; or, in other words, that the claimants, in case their claim is allowed, must be put in possession of the property itself, and not of its value. I know of no principle or rule of international law to that effect.

If the claimants have no such legal right to have the property delivered up *in specie*, it matters not whether the property is sold for good reasons, and so converted into money, or is requisitioned by the Crown (instead of going through the form of sale) upon an undertaking to pay into Court the appraised value.

But, apart from any inherent power of the Court, the Order referred to in the Prize Court Rules (Order XXIX.) deals expressly with the matter, and prescribes the practice to be pursued. I will consider hereafter the larger question whether this Order violates an acknowledged and settled principle of the law of nations, and whether, if it does, it nevertheless, as an Order made by His Majesty in Council, must be observed and obeyed by this Court.

Before approaching that wide and important subject, I must declare that, in my view, Order XXIX. deals only with a matter affecting the procedure and practice of the Court—a domestic affair, in which no foreign neutral or enemy has any voice or right to interfere. It deals only with interlocutory steps which may be taken in this Court after prize proceedings have been instituted.

Matters of practice in proceedings such as sale of property, or delivery up on bail, or upon appraisement, are not of international concern, and are not and cannot be regulated by uniform international principles or procedure to be applied in the Courts of all countries; as an example, a reference to the Prize Regulations of Russia and of Japan during the war of 1898 will shew that they differ as to the rules regulating sale of

captured vessels and goods before or after the institution of prize proceedings.

If Order XXIX. deals, as I think it does, merely with the regulation of the practice and procedure of this Prize Court, it has the force of an Act of Parliament, as it has been made under statutory powers. But if it goes beyond procedure and practice it has nevertheless the force properly attributable to an Order in Council. This appears by the Order itself; and in the Naval Prize Act of 1864 there is an express saving of the right, power, or prerogative of the Crown, as there is also of the jurisdiction or authority of or exercisable by the Prize Court.

If it is regarded as an Order in Council, it is, in my opinion, within the power and prerogative of the Crown to make an Order giving the right to requisition neutral property which may be of use to the Crown as a belligerent, subject to making compensation therefor. For instance, where in former wars such things as planks, sailcloths, pitch, hemp, and copper sheets belonging to neutrals were ordered before condemnation to be handed over to the Government pursuant to an order or declaration of the Crown, see the following cases, gathered from *Hay and Marriott's Reports* [1778-1779]: THE VROW ANTOINETTE, 142; DE JONGE JOSLERS, 148; CONCORDIA AFFINITATIS, 169; THE SARAH AND BERNHARDUS, 176; THE HOPPET, 217; JONGE GERTRUYDA, 246; CONCORDIA SOPHIA, 267; THE DREI GEBROEDERS, 270; THE JONGE JUFFERS, 272; and also the cases mentioned at pages 287-8.<sup>2</sup>

As to the law relating to foodstuffs, reference may be made to THE HAABET [1800] (1 Eng. P.C. 212; 2 C. Rob. 174). Lord Stowell (at pages 214 and 215 in the *English Prize Cases Reports*, pages 182 and 183 in the *Christopher Robinson Reports*) deals with this question as follows:

“The right of taking possession of cargoes of this description, *commeatus*, or provisions, going to the enemy's ports, is no

(2) “Thirty-four causes of naval store ships, chiefly Dutch. The neutral store ships were all restored with freight, and all reasonable expenses of the claimant and captor, and the stores were decreed to be sold upon a fair valuation.

“The Proctors for some of the neutrals entered protests against the decree of sale, but the Judge observed . . . that there was a peculiar absurdity in neutrals appealing to His Majesty in Council against a decree of sale exactly squaring with His Majesty's own declaration formed and settled in Council and notified to the Dutch States and all the rest of the neutral maritime powers.”

peculiar claim of this country; it belongs generally to belligerent nations; the ancient practice of Europe, or at least of several maritime states of Europe, was to confiscate them entirely; a century has not elapsed since this claim has been asserted by some of them. A more mitigated practice has prevailed in later times of holding such cargoes subject only to a right of pre-emption—that is, to a right of purchase upon a reasonable compensation to the individual whose property is thus diverted. I have never understood that, on the side of the belligerent, this claim goes beyond the case of cargoes avowedly bound to the enemy's ports, or suspected, on just grounds, to have a concealed destination of that kind; or that on the side of the neutral, the same exact compensation is to be expected which he might have demanded from the enemy in his own port; the enemy may be distressed by famine, and may be driven by his necessities to pay a famine price for the commodity if it gets there; it does not follow that acting upon my rights of war in intercepting such supplies I am under the obligation of paying that price of distress. It is a mitigated exercise of war on which my purchase is made, and no rule has established that such a purchase shall be regulated exactly upon the same terms of profit which would have followed the adventure, if no such exercise of war had intervened; it is a reasonable indemnification and a fair profit on the commodity that is due, reference being had to the original price actually paid by the exporter and the expenses which he has incurred.

“As to what is to be deemed a reasonable indemnification and profit I hope and trust that this country will never be found backward in giving a liberal interpretation to these terms. But certainly the capturing nation does not always take these cargoes on the same terms on which an enemy would be content to purchase them; much less are cases of this kind to be considered as cases of costs and damages, in which all loss of possible profit is to be laid upon unjust captors, for these are not unjust captures, but authorized exercises of the rights of war.”

As to interlocutory orders dealing with seized cargoes in prize proceedings from early times in this country up to more recent times in the United States of America, numbers of instances will be found of orders for sale before condemnation, and also for delivery to the State of goods not already condemned upon their value being paid into Court or secured: in some cases

where on the final hearing it was decided the goods were not confiscable, and in some even before legal proceedings in prize had been commenced.

As it was contended that to give effect to Order XXIX. by allowing the State to requisition would be to act in violation of the law of nations, it would appear to be more useful for the purpose of inducing conviction to extract instances from the practice of other countries. Accordingly, I will refer to some cases from the United States of America, the Courts of which, next possibly to our own, have done most for the elucidation and development of the law of nations applicable to the law of prize.

In *THE ST. LAWRENCE AND CARGO* [1814] (2 Gall. 19) Mr. Justice Story states (at page 21) that in that case the property was sold under an interlocutory order before final condemnation, and the proceeds were brought into the Registry to abide the final decision of the appellate Court.

In *THE AVERY AND CARGO* [1814] (2 Gall. 307) the same learned Judge dealt on appeal with an application by the captors relating to the proceeds of sale of goods made under an interlocutory order pending the proceedings in the Court below (whereof restoration was afterwards decreed); and in the course of his judgment he said (at page 309):

“It is very clear that the terms of this Act [an Act of 1813 providing for the sale by the Marshal of condemned vessels] apply only to sales after a final condemnation, and not to sales made *pendente lite* under interlocutory decrees of Court . . . Interlocutory sales are often ordered under a perishable monition and survey, or for other good cause in the discretion of the Court.”

I will cite a few later instances decided in 1862-3 which arose during the American Civil War. In *THE SARAH AND CAROLINE AND CARGO* [1862] (Blatchford Pr. Cas. 123) a neutral vessel was captured on the ground that she was trying to break a blockade. The cargo was sold before condemnation as appears from the following passage in the judgment of Mr. Justice Betts:

“No appearance having been entered in the suit on due return of the warrant of arrest of the cargo, and the capture having vested jurisdiction in the Prize Court over the property seized, it is ordered that an interlocutory order for the sale of the cargo arrested in the cause be made, and that the proceeds



thereof be deposited in the cause in the Registry of the Court, to abide the further order of the Court."

Another significant case, when the vessel and cargo were delivered over to the public use by order made even before the libel in prize was filed and without notice to any claimant, was the steamer MEMPHIS AND CARGO [1862] (Blatchford Pr. Cas. 202).

The vessel was British, and the cargo also belonged to British subjects.

The headnote is as follows :

"This vessel having been sent in to the Court as a prize, the Court, on the application of the District Attorney *before libel filed*, and before any appearance by any claimant, and without notice to any claimant, made an order appointing appraisers to value the prize, *with the view to her being taken for the use of the Government*. After the libel was filed the claimant appeared in the suit, and moved to vacate the order because it was made without notice to him. Held, that the motion could not be granted. Property captured as prize is under the control of the Court from the time it is delivered to the Court by the prize-master until it is finally disposed of, and the filing of a libel is not necessary to give the Court cognizance of the property."

I may observe that the order for appraisement and delivery embraced the cargo as well as the ship. I will cite one passage from the judgment (at pages 203 and 204), as it appears to me to be important :

"The point most strenuously urged by the several counsel was that the Prize Court acquires no cognizance of a prize case except by means of a libel, which causes an arrest, in law, of the property captured, and subjects it thereafter to judicial jurisdiction. This, it appears to me, is a manifest misapprehension of the state of the matter under the jurisprudence of the United States. The prize vessel and all her cargo and papers are, in the first instance, transmitted by the officer making the capture to the charge of the Judge of the district to which such prize is ordered to proceed (2 U.S. Stat. at Large, art. 7).

"The standing Prize Rules, fully confirmed by the Act of Congress 'relative to judicial proceedings upon captured property and the administration of the law of prize,' approved March 25, 1862, place the property captured under the control of the Court

and its officers, until the final adjudication and disposal of it by the Court.

“The notion, therefore, that the prerogative powers of the Government can be exercised only directly by the United States in its military capacity, and not at all through the Courts, cannot be supported under our laws. Those high functions are legitimately put in force by the instrumentality of the judiciary, in obtaining, through its agency, the active use of the possession of prize property, which first vests in that department.

“Accordingly, an order for the appraisal of captured property, and the surrender or transfer of it to Governmental uses, under precautionary provisions to secure individual interests vesting in it, is palpably a judicial power, to be performed at the instance of the Government, and need not, if, indeed, it can, be superseded or dispensed with by a direct and summary act of appropriation of the property by the executive authority.”

In the case of the steamer *ELLA WARLEY AND CARGO* [1862] (Blatchford Pr. Cas. 204) the method to be adopted for ascertaining the value of property handed over to the use of the captors was the matter chiefly discussed; but in the judgment Mr. Justice Betts dealt with the right of the captors thus:

“The prerogative right of the captors to take the property seized to their own use is modified only in subserviency to the modern law of war, that, in case a judicial confiscation of it is not secured, the captors are responsible only for its value to the lawful proprietor. That responsibility may be secured to the claimant by bail in Court for its worth, or other equivalent protection to such contingent right. The usage of this Court is to place the value in deposit in the Registry of the Court . . . to be restored and paid to the claimant in case of the acquittal of the property, in place of relying upon individual undertakings or responsibilities therefore”; and he proceeds (at page 206): “But all the decisions must rest on the same principle—that it is competent to the Government, through the agency of the Courts, to take immediate possession and use of the captured property on guaranteeing by bail or deposit, at its worth, the restoration of its value to its lawful claimants.”

At a later stage, in dealing with the same vessel and her cargo, the learned Judge said:

"I retain the conviction that the Government possesses the legal rights of claiming a direct appropriation to public use of captured property, and that the Courts are bound to carry such demand into execution, according to the usual course of procedure before it—*vide* THE ELLA WARLEY AND CARGO (Blatchford Pr. Cas., at p. 209)."

The cases of THE MEMPHIS (Blatchford Pr. Cas. 202) and THE ELLA WARLEY (Blatchford Pr. Cas., at p. 209) afterwards came on appeal before Mr. Justice Nelson, Associate Justice of the Supreme Court of the United States, who was no mean authority upon questions of prize law, and none of the principles enunciated by Mr. Justice Betts in that case were disapproved.

Finally, I would refer to the case of the schooner STEPHEN HART AND CARGO [1863] (Blatchford Pr. Cas. 387). The case was finally determined on July 30, 1863. Meantime, by interlocutory orders, some made before the libel in prize and others after proceedings were taken, but all made before final decree, parts of the cargo were delivered to the Navy Department for the use of the United States; other parts to the War Department, the Ordnance Department, and the Sanitary Department of the States; and the schooner herself and the remainder of her cargo were sold by public auction; and all the proceeds of the vessel and her cargo, delivered and sold as aforesaid, were paid into the Registry of the Court, to await the final determination and decree of the Court.

In view of the cases to which reference has now been made, it cannot, in my opinion, be possible to maintain that the requisition by the State of captured property, which is provided for by Order XXIX. of the Prize Court Rules, is a violation of an acknowledged or settled principle or rule of the law of nations.

If the view just expressed is correct, it is not necessary to discuss the question whether this Court is bound to obey an Order in Council which may run contrary to the acknowledged law of nations. If that question should arise, I am humbly and fully content to assume the standpoint of Lord Stowell in the case of THE FOX (Edw. 312), in which he had to deal with the Orders in Council which were made by way of reprisal after the celebrated Berlin and Milan decrees of Napoleon. He expressed his view of the duty of the Prize Court with reference to the law of nations, and to Orders in Council by the State in

and under which the Court exercised jurisdiction, in the following classical passages:

“In the course of the discussion a question has been started, What would be the duty of the Court under Orders in Council that were repugnant to the law of nations? It has been contended on one side that the Court would at all events be bound to enforce the Orders in Council; on the other, that the Court would be bound to apply the rule of the law of nations adapted to the particular case, in disregard of the Orders in Council. I have not observed, however, that these Orders in Council, in their retaliatory character, have been described in the argument as at all repugnant to the law of nations, however liable to be so described if merely original and abstract. And, therefore, it is rather to correct possible misapprehension on the subject than from the sense of any obligation which the present discussion imposes upon me, that I observe that this Court is bound to administer the law of nations to the subjects of other countries in the different relations in which they may be placed towards this country and its Government. This is what other countries have a right to demand for their subjects, and to complain if they receive it not. This is its unwritten law, evidenced in the course of its decisions, and collected from the common usage of civilized states. At the same time it is strictly true that by the constitution of this country the King in Council possesses legislative rights over this Court, and has power to issue orders and instructions, which it is bound to obey and enforce; and these constitute the written law of this Court. These two propositions, that the Court is bound to administer the law of nations, and that it is bound to enforce the King's Orders in Council, are not at all inconsistent with each other; because these orders and instructions are presumed to conform themselves, under the given circumstances, to the principle of its unwritten law. They are either directory applications of those principles to the cases indicated in them—cases which, with all the facts and circumstances belonging to them, and which constitute their legal character, could be but imperfectly known to the Court itself—or they are positive regulations, consistent with those principles, applying to matters which require more exact and definite rules than those general principles are capable of furnishing.

“The constitution of this Court, relatively to legislative power of the King in Council, is analogous to that of the Courts of common law, relatively to that of the Parliament of this kingdom. Those Courts have their unwritten law, the approved principles of natural reason and justice; they have likewise the written or statute law in Acts of Parliament, which are directory applications of the same principles to particular subjects, or positive regulations consistent with them, upon matters which would remain too much at large if they were left to the imperfect information which the Courts could extract from mere general speculations. What would be the duty of the individuals who preside in those Courts if required to enforce an Act of Parliament which contradicted those principles is a question which I presume they would not entertain *à priori*; because they will not entertain *à priori* the supposition that any such will arise. In like manner, this Court will not let itself loose into speculations as to what would be its duty under such an emergency; because it cannot, without extreme indecency, presume that any such emergency will happen; and it is the less disposed to entertain them, because its own observation and experience attest the general conformity of such orders and instructions to its principles of unwritten law. In the particular case of the orders and instructions which give rise to the present question, the Court has not heard it at all maintained in argument that, as retaliatory orders, they are not conformable to such principles. They are so declared in their own language and in the uniform language of the Government which has established them. I have no hesitation in saying that they would cease to be just if they ceased to be retaliatory: and they would cease to be retaliatory from the moment the enemy retracts, in a sincere manner, those measures of his which they were intended to retaliate.”

Judges and jurists have pronounced upon this subject after the judgment of Lord Stowell in *THE FOX* (Edw. 312).

In *MAISONNAIRE v. KEATING* (2 Gall. 325) Mr. Justice Story expressed his view as follows:

“The legality of the conduct of the captors may, under circumstances, exclusively depend upon the ordinances of their own Government. *If, for instance, the Sovereign should, by a special order, authorize the capture of neutral property for a cause manifestly unfounded in the law of nations, there can be no doubt that it would afford a complete justification of the*

*captors in all tribunals of prize. The acts of subjects, lawfully done under the orders of their Sovereign, are not cognizable by foreign Courts. If such acts be a violation of neutral rights, the only remedy lies by an appeal to the Sovereign, or by a resort to arms. A capture, therefore, under the Berlin and Milan decrees, or the celebrated Orders in Council, although they might be violations of neutral rights, must still have been deemed, as to the captors, a rightful capture, and have authorized the exercise of all the usual rights of war."*

Upon this subject I may cite the following passage from the judgment of an American Judge a generation later :

"The general argument against the expediency of subjecting property to peremptory sale before condemnation or trial must yield to the provisions of positive law"—*vide per Mr. Justice Betts in THE NASSAU [1862] (Blatchford Pr. Cas. 198).*

Our text writers acknowledge the binding force of Orders in Council of the State in which the Court exercises jurisdiction. I will only cite the opinions of one of them, the late Dr. Westlake. In dealing with coast fishing vessels he writes :

"But if the captures were made in pursuance of a Government Order, the Prize Court, in the absence of anything to the contrary in the constitution of the country, will be bound by such an order emanating from the authority under which it sits"—see vol. ii. p. 155.

And in dealing more generally with the subject this learned and esteemed author writes :

"Questions of prize have always been matters of the domestic jurisdiction of the captor's country, commonly called the admiralty jurisdiction from its original form, by whatever name the branch exercising it may be known in any modern system of procedure. It is open to all those of any nationality whose interests may be affected by its decisions, and it is the duty of its Judges, a duty in which they have seldom failed in any civilized country, to do justice to them all with strict impartiality. In that sense a Court of Admiralty is an international one, but in that sense only, for the law which it administers cannot help bearing the impress of its own nationality.

"A Court must take its law from the authority under which it sits, and for a Court of Admiralty that authority has never been any other than that of its own country. It must apply any rules on international questions which it finds to be generally

agreed on, a condition which involves the agreement of its own country with them. Where there is no general agreement and the supreme authority of its own country has not taken a decided line, the Court must take that line which justice appears to it to require, whether favourable or not to a fellow-subject being a party before it, or to what it may conceive to be the interest of its country. But where the supreme authority under which it sits has taken a decided line, a Court of Admiralty, like any other Court, can only obey. Thus we have seen the English Parliament and Privy Council determining from time to time whether neutral goods in enemy ships should be deemed lawful prize, and the English Admiralty deciding one way in 1357 and the other way two centuries and a half afterwards. When the famous Orders in Council laid down rules, as to neutral shipping for the then naval war, which were certainly not justifiable otherwise than by way of retorsion against the Berlin and Milan decrees, the British Admiralty did not and could not presume either to refuse execution to the orders, or to exercise an independent judgment as to their justification" (vol. ii. pp. 317-318).

I am not called upon to declare what this Court would or ought to do in an extreme case if an Order in Council directed something to be done which was clearly repugnant to, and subversive of, an acknowledged principle of the law of nations.

I make bold to express the hope and belief that the nations of the world need not be apprehensive that Orders in Council will emanate from the Government of this country in such violation of the acknowledged law of nations as to make it conceivable that our prize tribunals, holding the law of nations in reverence, would feel called upon to disregard and refuse obedience to the provisions of such Orders.

For the reasons, historical and other, which I have endeavoured to set forth, I am of opinion that nothing contained in the provisions of Order XXIX. of the Prize Court Rules is repugnant to international law; and that the powers entrusted to and to be exercised by the Court under the Order are in accordance with the inherent powers of the Court itself and are well within the rights of the Crown under the statutory provisions referred to, no less than under its prerogative authority.

I therefore order the copper to be delivered up to the Crown as prayed by the summons.

Leave to enter an appeal within twenty-one days; security for costs 250*l*.

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*Solicitors*—Treasury Solicitor; Botterell & Roche.

[*Reported by E. C. Trehern, Esq., Barrister-at-Law.*

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[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). July 5, 15, 1915.

THE SOUTHFIELD.

*Cargo—Sale in Transitu—Imminence of War—Belligerent Vendors—Neutral Purchasers—Outbreak of War—Seizure as Prize—Sale not in Contemplation of War—Validity.*

*The rule of the Prize Court that property in goods is considered to be in the shipper until delivery, and that a sale in transitu is invalid, does not apply unless war is imminent and expected on the part of the vendor, and the sale is made to defeat the rights of belligerent captors.*

*Between July 20 and 30, 1914, German merchants sold to Dutch merchants various parcels of cargo in transitu, shipped on board a British steamship and consigned to a German port "to order." The Dutch merchants duly paid for the goods which they re-sold to customers of their own. On August 4 war broke out between Great Britain and Germany, and when the ship called at a British port the cargo was seized as prize and afterwards sold:—Held, on the evidence, that war with Great Britain was not regarded as imminent—in its proper meaning of "threatening or about to occur"—by the German vendors when they sold the goods; that consequently the sales were valid and the goods were not confiscable as prize; and that the proceeds of sale must be released.*

Suit for condemnation of cargo as prize.

On July 16, 1914, the British steamship *Southfield* left Novorossiisk, a Russian Black Sea port, with a cargo of barley



shipped by Wülker & Co., a firm of German merchants, and consigned "to order, Emden."

On July 20, one J. R. Heukers, a Dutch merchant, carrying on business at Groningen in Holland, bought 197,000 kilos of the barley and took up the documents on July 27; and, by contracts of sale dated July 24 and 25, one Wilhelm Barghoorn, another Dutch merchant, bought other portions of the cargo amounting to 200,000 kilos, the property in which was transferred to him on July 29 and 31. Both merchants at once re-sold to customers of their own.

War broke out between Great Britain and Germany on August 4, and on August 8, when the *Southfield* put into Plymouth, she was diverted to Portsmouth where the cargo was seized as prize. The vessel was then sent round to London where the cargo was discharged and sold, and the proceeds paid into Court.

The two Dutch merchants claimed the release of the proceeds of their goods on the ground that they became purchasers before the outbreak of war, and with no knowledge or expectation of the outbreak of war.

*Maurice Hill, K.C.*, and *R. H. Balloch*, for the Crown.—Although the property passed to neutral purchasers before the date of seizure, the question the Court has to determine is, under what circumstances the rule ought to be applied that a captor is entitled to disregard the passing of property where the contract was made when war was imminent and expected. These were German goods on a British vessel, and if the Court came to the conclusion that the sellers, knowing that war was imminent, were trying to cover themselves by a sale of the goods to persons who would be neutral, in order to avoid probable capture by a belligerent, the Court was entitled to condemn the goods: see *THE BALTICA* [1857] (11 Moo. P.C. 141; 2 Eng. P.C. 628), *THE VROW MARGARETHA* [1799] (1 C. Rob. 336; 1 Eng. P.C. 149), *THE ARIEL* [1857] (11 Moo. P.C. 119; 2 Eng. P.C. 600), and *THE JAN FREDERICK* [1804] (5 C. Rob. 128; 1 Eng. P.C. 434); see also *Story's Principles and Practice of Prize Courts* (Pratt's edition), pp. 63-64. At the date of the contracts there may not have been imminent expectation of war in Great Britain, but the question must be regarded from the point of view of the knowledge and expectation of the German merchants, and evidence

could be adduced that during the last days of July, and even earlier, German merchants were loading cargoes as fast as they could, and disposing of them, as far as possible, to neutrals.

*H. C. S. Dumas*, for the Dutch claimants.—Although towards the end of July, 1914, German merchants may have contemplated war against France and Russia, there was no expectation on their part of war with Great Britain, and it came as a painful surprise to them. These were *bona fide* sales, and the rights of the neutral purchasers should not be defeated on indefinite and shadowy grounds. The doctrine laid down in the old cases cited on behalf of the Crown has been modified by the Declaration of London. It is not imminence of war, but the actual outbreak of hostilities, that is the test as regards the transfer of enemy goods on an enemy vessel, or of the vessel itself, to neutrals, and the same rule should apply to goods on a British vessel.

*Cur. adv. vult.*

*July 15.*—SIR SAMUEL EVANS (THE PRESIDENT).—The questions arising for decision depend upon the effect of the intervention of a state of war upon the rights of capture of a belligerent in respect of goods sold by an enemy to a neutral while the goods and the ship in which they are laden are *in transitu*.

The goods consisted of quantities of barley shipped before the war at a Russian port upon a British ship, and consigned to a German port. During the voyage the goods were sold by enemy merchants to neutral merchants—namely, to two Dutch merchants, Heukers and Barghoorn, carrying on business at Groningen. The transactions relating to the sale to Heukers fell within the period from July 20 to July 28, 1914, and those relating to the sale to Barghoorn within the last week in July, 1914. Apart from any question depending upon the intervention of war, it is not disputed that the property in the goods had passed to the neutral purchasers before the capture.

The contention of the Crown was that when war was declared between this country and Germany on August 4, 1914, the goods, which were still *in transitu*, became subject to capture by the Crown, and were confiscable at the time of the capture and seizure on August 8, notwithstanding the prior sales to the neutrals, on the ground that at the time of such sales war was imminent, or in contemplation of the enemy vendors.

It is important to examine closely the principle which governs the right of capture of goods transferred *in transitu*, and to ascertain accurately its limits, as it is sometimes apt to be loosely stated.

In order to deduce the rule it will be sufficient, I think, to refer to two leading cases, and to one authorised text book. I take them in order of date.

In *THE VROW MARGARETHA* (1 C. Rob. 336, at p. 337; 1 Eng. P.C. 149, at p. 151) Lord Stowell pronounces upon the subject as follows: "In the ordinary course of things in time of peace—for it is not denied that such a contract may be made, and effectually made (according to the usage of merchants)—such a transfer *in transitu* might certainly be made. It has even been contended that a mere delivering of the bill of lading is a transfer of the property. But it might be more correctly expressed, perhaps, if said that it transfers only the right of delivery; but that a transfer of the bill of lading, with a contract of sale accompanying it, may transfer the property in the ordinary course of things, so as effectually to bind the parties, and all others, cannot well be doubted. When war intervenes, another rule is set up by Courts of Admiralty, which interferes with the ordinary practice. In a state of war, existing or imminent, it is held that the property shall be deemed to continue as it was at the time of shipment till the actual delivery; this arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy. If such a rule did not exist, all goods shipped in an enemy's country would be protected by transfers which it would be impossible to detect. It is on that principle held, I believe, as a general rule, that property cannot be converted *in transitu*, and in that sense I recognise it as the rule of this Court. But this arises, as I have said, out of a state of war, which creates new rights in other parties, and cannot be applied to transactions originating, like this, in a time of peace."

In the work of Mr. Justice Story on *The Principles and Practice of Prize Courts*, that celebrated jurist states the rule in the following passage (Pratt's Edition, pp. 64-65): "In respect to the proprietary interests in cargoes, though, in general, the rules of the common law apply, yet there are many peculiar principles of prize law to be considered; it is a general rule that, during hostilities, or imminent and impending danger of

hostilities, the property of parties belligerent cannot change its national character during the voyage, or, as it is commonly expressed, *in transitu*. This rule equally applies to ships and cargoes; and it is so inflexible that it is not relaxed, even in owners who become subjects by capitulation after the shipment and before the capture. . . . The same distinction is applied to purchases made by neutrals of property *in transitu*, if purchased during a state of war existing or imminent, and impending danger of war, the contract is held invalid, and the property is deemed to continue as it was at the time of shipment until the actual delivery. It is otherwise, however, if a contract be made during a state of peace, and without contemplation of war; for, under such circumstances, the Prize Courts will recognise the contract and enforce the title acquired under it. . . . The reason why Courts of Admiralty have established this rule as to transfers *in transitu* during a state of war or expected war, is asserted to be, that if such a rule did not exist all goods shipped in the enemy's country would be protected by transfers, which it would be impossible to detect."

Lastly, in *THE BALTIKA* (11 Moo. P. C. 141; 2 Eng. P.C. 628) in the judgment of the Lords of the Privy Council, sitting to hear appeals in Prize, Lord Kingsdown (then Mr. Pemberton Leigh) deals with the rule as applicable to ships and goods in the following passages: "The general rule is open to no doubt. A neutral, while a war is imminent, or after it has commenced, is at liberty to purchase either goods or ships (not being ships of war) from either belligerent, and the purchase is valid, whether the subject of it be lying in a neutral port or in an enemy's port. During a time of peace, without prospect of war, any transfer which is sufficient to transfer the property between the vendor and vendee is good also against a captor if war afterwards unexpectedly break out. But, in case of war, either actual or imminent, this rule is subject to qualification, and it is settled that in such case a mere transfer by documents which would be sufficient to bind the parties, is not sufficient to change the property as against captors as long as the ship or goods remain *in transitu*.

"With respect to these principles, their Lordships are not aware that it is possible to raise any controversy; they are the familiar rules of the English Prize Courts, established by all the authorities, and are collected and stated, principally from

the decisions of Lord Stowell, by Mr. Justice Story, in his *Notes on the Principles and Practice of Prize Courts*, a work which has been selected by the British Government for the use of its naval officers as the best code of instruction in the prize law. The passages referred to are to be found in pp. 63, 64, of that work.

“In order to determine the question, it is necessary to consider upon what principle the rule rests, and why it is that a sale which would be perfectly good if made while the property was in a neutral port, or while it was in an enemy’s port, is ineffectual if made while the ship is on her voyage from one port to the other. There seem to be but two possible grounds of distinction. The one is, that while the ship is on the seas, the title of the vendee cannot be completed by actual delivery of the vessel or goods; the other is, that the ship and goods, having incurred the risk of capture by putting to sea, shall not be permitted to defeat the inchoate right of capture by the belligerent Powers, until the voyage is at an end.

“The former, however, appears to be the true ground on which the rule rests. Such transactions during war, or in contemplation of war, are so likely to be merely colourable, to be set up for the purpose of misleading or defrauding captors, the difficulty of detecting such frauds, if mere paper transfers are held sufficient, is so great that the Courts have laid down as a general rule that such transfers, without actual delivery, shall be insufficient; that in order to defeat the captors, the possession, as well as the property, must be changed before the seizure. It is true that, in one sense, the ship and goods may be said to be *in transitu* till they have reached their original port of destination; but their Lordships have found no case where the transfer was held to be inoperative after the actual delivery of the property to the owner” (11 Moo. P.C., at pp. 145-146; 2 Eng. P.C., at pp. 630-632).

It might be argued that according to these authorities transfers *in transitu* are invalid against belligerent captors upon the intervention of war unless there is actual delivery before capture; or, in other words, that if war has intervened no transfer by documents alone can defeat the right of capture. But, in my opinion, that proposition is too wide, and is not an accurate delimitation of the true rule. In the passages cited Lord Stowell speaks of “a state of war existing or imminent”; Mr. Justice

Story of "a state of peace, without contemplation of war," and of "a state of war existing or imminent, and impending danger of war"; and Lord Kingsdown of "war, either actual or imminent," of "war unexpectedly breaking out" (contrasting it with "a time of peace, without prospect of war"), and of "transactions during war or in contemplation of war."

It is important to note the reasons for the rule which are elaborated by Lord Kingsdown thus: [His Lordship repeated the passage set out above, beginning "Such transactions during war," and continued:] In my view the element that the vendor contemplated war, and had the design to make the transfer in order to secure himself and to attempt to defeat the rights of belligerent captors, is necessarily involved in the rule which invalidates such transfers. Sales of goods upon ships afloat are now of such common occurrence in commerce that it would be too harsh a rule to treat such transfers as invalid unless such an element existed.

I have been considering the rule in its application to the sale or transfer of goods, but it is well to note that special and highly artificial rules as to the transfer of vessels during or preceding a state of war are now laid down in the Declaration of London of 1909—as agreed to by the representatives of the Powers, and as applied by the Orders in Council in this country. But these do not apply to goods or merchandise.

As to the facts in these two cases, it is abundantly clear that the neutral purchasers acted with complete *bona fides* throughout; they paid for the goods, and re-sold them to neutral customers of their own before war was declared. This would not necessarily conclude the matter.

But I am also satisfied that the vendors did not have the war between their country and this country (to which the ship carrying the goods belonged) in contemplation when they sold the goods. The imminence of war between Germany and Russia has no materiality in considering these cases. In the light of after events, the war with this country may be spoken of as having been imminent, regarded from the point of view of time, in the last two weeks of July; but there is no evidence that it was regarded as imminent in its proper meaning of "threatening or about to occur" by German merchants at that time; not only so, but I find, after investigation in various directions, and on grounds which I deem satisfactory, that it was not in fact so

regarded by them. What the hidden anticipation of the Government of the German Empire might have been upon the subject it is not for me to speculate; but I may express my humble opinion that our intervention in the war upon the invasion of Belgium in defence of treaty obligations, against the breach of such obligations by the invaders, was a complete surprise even to their Government.

Documents and facts which throw light upon the history of the days I have been dealing with between July 24 and August 4, 1914, are, I think, admirably collected and stated in a work called *The History of Twelve Days*, by Mr. J. W. Headlam.

On the grounds that the German vendors had no thought of the imminence of war between Germany and this country, and did not have such a war in contemplation at any time while the transactions of sale were taking place or before they were completed, I hold that the sales to the two Dutch merchants were valid, and that the goods were not confiscable. And I decree the release to them respectively of the net proceeds of the sale of their respective goods, which are now in Court.

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*Solicitors*—Treasury Solicitor; Thomas Cooper & Co.

[*Reported by E. C. Trehern, Esq., Barrister-at-Law.*

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[IN HIS MAJESTY'S COMMERCIAL COURT FOR MALTA. IN PRIZE.]

PARNIS, J. Dec. 14, 1914.

### THE ERYMANTHOS.

*Enemy Vessel—Ignorance of Outbreak of War—Arrival off Belligerent Port—Orders to Proceed to Examination Anchorage—Capture—At Sea or Entering Port—Sixth Hague Convention, arts. 1 and 3.*

*A German vessel arrived off Malta in ignorance of the outbreak of hostilities between Great Britain and Germany, and, on approaching the Grand Harbour, was ordered by the warning steamer, stationed in the offing for the purpose of directing*

vessels to an examination anchorage, to go to St. Paul's Bay. Whilst on her way there she was met by two British destroyers, and told to follow one of them into St. Paul's Bay, where she was left in charge of another British warship as prize of war :— Held, that the vessel was captured at sea in territorial waters between the Grand Harbour and St. Paul's Bay; that she was not "*Entrant dans un port ennemi*" while still in ignorance of hostilities, within the meaning of article 1 of the Sixth Hague Convention; that that article did not apply to an enemy ship to which admission had been refused, and that as Germany had refused her assent to article 3, which exempted from confiscation an enemy vessel "*rencontré en mer*" in ignorance of hostilities, she must be condemned.

Cause for the condemnation of the German steamship *Erymanthos*, 2,934 tons gross, belonging to the Deutsche Levante Linie of Hamburg, which was captured on August 5, 1914, between the Grand Harbour and St. Paul's Bay, Malta, in the circumstances which are fully set out in the judgment.

Sir Vincent Frendo Azopardi (Crown Advocate), for the Crown.

E. C. Vassallo, for the claimants.

The arguments sufficiently appear in the judgment.

PARNIS, J.—I am very much obliged to the Crown Advocate and to the learned counsel that have appeared on behalf of the ship for the very valuable assistance they have given me. The case on both sides has been stated with great ability and thoroughness, thus rendering my task comparatively easy.

The facts of this case may be briefly stated as follows:

The evidence in this case consists of the ship's papers and of the affidavits of the commanders of H.M.S. *Bulldog* and *Beagle* and of Gunner Simcox of H.M.S. *Hussar*. Some question has arisen owing to a discrepancy between the official translation of the log book and the translation read to the Court by the learned counsel for the steamer before the official translation had been filed. The discrepancy is not very important. The official translation is that the *Erymanthos* steamed past the entrance of the harbour, and there received orders from the warning ship. The translation read by the learned counsel is that the steamer



stopped outside the entrance of the harbour, where she met the warning ship.

The s.s. *Erymanthos* is a German ship, owned by a German company, and belonging to the port of Hamburg. The ship's papers conclusively prove it. That steamer, after loading a general cargo at Antwerp, left that port on July 25 or 26, bound for Malta, Alexandria, Syrian ports, and Odessa.

On August 3 a proclamation was issued by His Excellency the Governor enacting regulations respecting the ports and the harbours of these islands, and the location of ships and boats therein and in the waters of these islands. Clause 6 enacts that merchant vessels desiring to enter the Grand or Marsamuscetto Harbours will be directed by a warning steamer stationed in the offing to proceed first to one or other of the examination anchorages. The examination anchorages fixed by clause 8 are Marsascirocco Bay and St. Paul's Bay.

The master of the *Erymanthos* states in the log book that he steamed past the entrance of the harbour, or stopped at the entrance of the harbour, and there received orders from the warning steamer to proceed to St. Paul's Bay. When half-way his ship was overtaken by two destroyers, one of which ordered the ship to follow such destroyer. At 7.10 A.M. the *Erymanthos* anchored in St. Paul's Bay, a pilot came on board with a naval officer and three sailors, the German flag was hauled down, and the *Erymanthos* was taken into the Grand Harbour.

The affidavits sworn to by the commanders of His Majesty's ships *Beagle* and *Bulldog* shew that they received orders to proceed to sea and capture the *Erymanthos*. The *Erymanthos* was met by the destroyers while proceeding to St. Paul's Bay. The *Bulldog* went up to the *Erymanthos* and told the master to follow the *Bulldog* to St. Paul's Bay. On arrival a signal was made to the *Erymanthos* to cast anchor, and she was left in charge of His Majesty's ship *Hussar*. Those affidavits are also confirmed by the affidavit of Albert Edward Simcox, gunner of His Majesty's ship *Hussar*.

The Crown applied for the condemnation of the ship and of the goods laden therein. I purpose to-day to deal with the steamer only, and not with the cargo. The Deutsche Levante Linie, owners of the ship, claim that by the Sixth Hague Convention of 1907, relative to the *status* of enemy merchant ships

at the outbreak of hostilities, the ship is to be detained and not condemned, and is to be restored at the cessation of hostilities.

The first question that I was called upon to determine was whether in a Prize Court an alien enemy could be heard.

At a sitting held on October 27, 1914, I stated that the general principles of law that have guided this Court in ordinary commercial proceedings with regard to alien enemies were that an alien enemy could not sue, but that, as it would have meant converting a disability into an exemption, an alien enemy might be sued; and if an enemy could be a defendant he must be heard, and not be condemned unheard. The ordinary rules on contracts, and on proceedings in the Commercial Court, are not entirely applicable to prize proceedings. Enemy property afloat belongs to the Crown, so that the owner of such property appearing in a Prize Court is in the position of a claimant for redress against the action of the Crown. The Prize Court rules foresee the possibility of an appearance and claim being entered by an alien enemy, and subject such appearance to the filing of an affidavit. I understand the rules to mean that the affidavit must shew that by an international agreement the alien enemy, who could not otherwise be heard, is entitled to appear and to ask for redress against the action of the Crown. In the affidavit of the *Deutsche Levante Linie* such international agreement was invoked, and therefore the alien enemy must be heard within the limits of such agreement. The alien enemy could not be heard to discuss general principles of international law or to criticise the proceedings, but must be heard with regard to any relief to which he may be entitled under the international agreement, which in itself is a licence from the Crown to appear and defend and maintain any right under such agreement. I now understand that the President of the Prize Court in England has, under similar circumstances, allowed an alien enemy to be heard. I might have made the order at that sitting, but having heard that a similar question was being discussed in England I postponed making the order out of due deference to the High Court in England. At that sitting, as I was bound to do, I asked the learned counsel to discuss whether I could make the appearance, subject to security for costs. Professor Vassallo submitted that no order for security for costs could be made until and when a claim was filed, and the *Deutsche Levante Linie* had not up to that time filed any claim. That may be

correct or not, but the learned counsel forgets the golden Order XLV. Each case presents special features, so that practically the Judge may follow such practice as he may direct, subject to an appeal to the Privy Council. As I have already stated, I take the view that the owners of a steamer, in appearing before the Prize Court, are practically claimants for redress against the action of the Crown, and as such may be compelled to give security for costs.

The Deutsche Levante Linie have now filed a claim, so that rule 2 of Order XVIII. would be clearly applicable, but as the Crown Advocate has not applied for such security I shall not make any order thereon.

Instructions will be given to the Registrar to note in the minute book that the order made by the President on November 9, 1914, by which he "directed that the practice of the Court should be that when an alien enemy thought that he was entitled to protection under the Hague Convention of 1907, he should be permitted to appear in Court as a claimant and argue his claim," is made a rule of the Malta Commercial Court in Prize, subject to such order for costs as the Judge may deem fit to make.

The general principles governing captures or seizures are very simple. Private property afloat belonging to the enemy may be seized or captured whether in a port, bay, or harbour, or at sea, whether in or out of territorial waters. Such property passes to the Crown either by right of capture or as droits of Admiralty, unless, by a convention with the belligerent Power, the Crown waives or limits such rights. It is important to state this general rule, inasmuch as the convention limiting the powers of the Crown, being an exception to the rule, must be interpreted restrictively, due regard being had to the circumstances under which the convention was made. The British Government has signified its intention with respect to Germany to abide by articles 1 and 2 of the Hague Convention, but not by article 3, with regard to which Germany made a reservation, and under which, therefore, German citizens cannot benefit.

I am therefore called upon to state whether this case comes under articles 1 and 2 or under article 3. If under articles 1 and 2, the ship could not be condemned for the present, but the claim filed by the Deutsche Levante Linie that the steamer is to be detained and restored at the cessation of hostilities cannot be allowed for the present as the British Government is not

quite certain with regard to the treatment of British ships in German ports. The President of the Prize Court in England has justly held that the order for detention should be with liberty for the Crown to apply for condemnation, and thus to keep the ship under the control of the Court. If this case comes under article 3, then the ship must be condemned.

Nobody appears to be very enthusiastic with regard to this particular convention. Professor Higgins states that the convention cannot be called progressive, for it questions a custom which seemed generally established, and its adoption would seem to sanction less liberal and enlightened practice. The official translation has been especially, with regard to article 3, severely criticised by the Attorney-General in the case of *THE PERKEO* (*ante*, p. 136) and qualified as not a very happy one, and the Attorney-General further stated that he did not know whether it referred to territorial waters or not, so long as it was not neutral waters; and in the case of *THE MÖWE* (*ante*, p. 60; [1915] P. 1) the learned President found such translation as not an accurate rendering of the French text. I presume that the words "high seas" in the official translation were used because Great Britain accepted the whole of the convention, and the expression "high seas" would *a fortiori* imply that ships met in territorial waters would be entitled to the same benefit, and any other expression appeared to the official translator not to be sufficiently comprehensive. Articles 1 and 3 of the convention refer to ships "dans un port ennemi, entrant dans un port ennemi, rencontrés en mer." I must therefore now proceed to examine whether the *Erymanthos* was "dans un port ennemi" or "entrant dans un port ennemi" or "rencontré en mer."

There is no question that the *Erymanthos* left the last port of departure before the commencement of the war and arrived in Maltese waters in ignorance of hostilities. And there is no question that at the outbreak of hostilities the *Erymanthos* was not in one of our ports—she was captured or seized after hostilities had broken out.

Capture is the forcible seizure or taking possession of an enemy ship. The learned counsel for the Deutsche Levante Linie quoted Roman principles of law to uphold his contention that the ship was "entrant," and that if she did not actually enter the port it was due to the action of the authorities of this island—a contention which I shall examine later on.

According to Roman law, although possession must be followed by a material occupation or taking charge of the thing possessed, at the initial stage it is sufficient to exercise the rights of possession and ownership. Capture, in a similar manner, is constituted as soon as the captor exercises rights of capture, shews his intention to capture, and the captured ship obeys his orders. The affidavits and the log book shew that the *Erymanthos*, while on her way to St. Paul's Bay, was met by two destroyers, who had instructions to seize her. One at least of those destroyers—namely, H.M.S. *Bulldog*—clearly shewed its intention to capture the *Erymanthos*, by ordering her to follow that destroyer to St. Paul's Bay and signalling to her to anchor. At St. Paul's Bay she was left in charge of H.M.S. *Hussar*, and such ship carried out the final stages of the capture. The master of the *Erymanthos* obeyed the orders of the *Bulldog*, and thus acquiesced in the capture. He may very well have been ignorant of the outbreak of hostilities when met by the warning ship, but no such ignorance can be presumed at the moment he was approached by the ships of war and ordered to follow a ship of war; obedience to those orders became, not a voluntary act, but a necessity, as the presence of three ships of war made resistance or escape impossible. I must therefore find that the capture really took place at sea in territorial waters between the Grand Harbour and St. Paul's Bay, although the material capture was in its final stages carried out by the *Hussar* at St. Paul's Bay.

It would, however, be immaterial if the capture had taken place at St. Paul's Bay. The President of the High Court in England, in the case of *THE MÖWE* (*ante*, p. 60; [1915] P. 1), laid down the rule that in the Hague Convention the word "port" must be construed in its usual and limited popular or commercial sense as a place where ships are in the habit of coming for the purpose of loading or unloading, embarking or disembarking, a place from which, if days of grace had been arranged, the steamer could be said to depart (*sortir*). St. Paul's Bay is not a port in that sense. St. Paul's Bay is a place of anchorage for examination purposes at a distance of some miles from the Grand Harbour, and in Malta we have no other ports within the meaning attributed to that word by the President except the Grand Harbour and Marsamuscetto Harbour. I fully concur with the ruling of the President, and consider that his interpretation is the only possible interpretation of the word

“port” used in the convention. If the *Erymanthos* had reached Malta before the outbreak of hostilities, she would not have been allowed to remain or anchor at St. Paul’s Bay except for examination purposes, and would have been ordered to enter one of the two ports above mentioned. The *Erymanthos*, therefore, was not in a port at the outbreak of hostilities, and was not in a port at the time of the capture.

The real difficulty that this case presents is to ascertain whether the *Erymanthos* was, or was not, a ship “entrant dans un port ennemi” while still ignorant that hostilities had broken out. Learned counsel for the claimants contended that, if the ship did not actually enter the Grand Harbour, she was desirous to do so, and was prevented by the warning ship. He quoted the well-known principle *Quoties per eum cuius interest conditionem non impleri fiat quominus impleatur perinde haberi ac si impleta conditio fuisset*, but that principle of civil law is hardly applicable to the case. No Government has the duty to allow an enemy ship to enter a port, and no enemy ship has a right to claim admittance. The terms of the convention are somewhat peculiar. They only exempt enemy ships from seizure, or better, they hold it desirable that to such ships days of grace should be granted if the ships succeed in entering the port being still ignorant that hostilities have broken out; so that while no Government is obliged to admit an enemy ship into a port, that ship, if she hears of the hostilities before actually entering the port, is liable to seizure if she does enter the port. Paragraph 2 of article 1 must, with regard to German ships, be construed to mean that if an enemy ship is allowed to enter a harbour, the Government thus allowing that steamer to enter while still ignorant that hostilities have broken out, cannot subsequently capture that ship. At the moment when an enemy ship seeks admission into a port the Government may not have at its disposal men-of-war on the spot to capture that steamer, and may therefore have an interest to allow admission to render the capture more easy.

This very restrictive interpretation of paragraph 2 of article 1 of the convention apparently involves hardship, but with regard to German steamers such hardship is due to the action of their own Government. Germany did not accept article 3, which would have saved the *Erymanthos*. It is not within my province to examine the reasons that induced Germany not to accept that

article. The Sixth Hague Convention of 1907 can only be liberally interpreted if taken as a whole, but, when a Power claims not to be bound by one of the provisions of the convention, the convention is to be read as if that particular article had never been inserted; and while articles 1, 2, and 3 read together might have insured protection of maritime operations undertaken in good faith and in process of being carried out before the outbreak of hostilities, by striking out article 3 the second paragraph of article 1 can only apply, as I above stated, to ships allowed to enter an enemy port while still ignorant of hostilities, and does not apply to an enemy ship to which admission has been refused.

I am therefore of opinion that the case of the *Erymanthos* does not come within articles 1 and 2 of the Sixth Hague Convention, 1907, and therefore I decree for the condemnation of the ship, and consequently order that the *Erymanthos* be appraised and sold.

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[IN THE SUPREME COURT OF HONG-KONG. IN PRIZE.]

GOMPERTZ, ACTING-C.J. Dec. 16, 1914.

### THE HANAMETAL.

*Neutral Ship—Unneutral Service—Removal of Non-combatants from Belligerent Port—Vessel in Control of Enemy Government—Transmission of Intelligence to Enemy—Suspicious Movements—Declaration of London, 1909, arts. 45 (1), 46 (2) (3).*

On July 28, 1914, an American-owned vessel arrived at Tsingtao, and on August 5 the officers, three of whom were British, were replaced by Germans, as no officers of a neutral Power could be obtained, and the German authorities would not allow British officers to navigate the vessel through the channel leading to Tsingtao, which was mined. The same day the vessel left for Chefoo with no cargo and a few Chinese coolies as passengers. On August 7 she returned from Chefoo, and left on August 9 for Shanghai. She carried no cargo on either voyage. She remained at Shanghai until August 20, when she again left for Tsingtao without cargo. In the course of this

voyage she was stopped by a British warship, and taken to Wei-hai Wei as prize.

The Crown claimed condemnation of the vessel on the following grounds: First, that, with the object of removing refugees, she was bound to Tsingtao, an enemy port which was likely to be, and shortly afterwards was, blockaded; secondly, that she was under the orders and control of the enemy Government; and thirdly, that her voyages between Chefoo and Tsingtao, which took her close to Wei-hai Wei, the naval station used by the British China squadron, were undertaken to gather and convey information to the enemy as to the movements of H.M. ships:—Held, first, that there was nothing inconsistent with the duties of a neutral in carrying ordinary passengers to or from a belligerent port; secondly, that on the evidence the German master was acting in the interests of the neutral owner, who had not surrendered the control of his vessel to the belligerent Government; thirdly, that some positive breach of neutrality must be proved before a neutral vessel can be condemned, and none had been established; and therefore, that, although the movements of the vessel were suspicious, she must be released.

Cause for the condemnation of a neutral vessel as prize on the ground that she was guilty of unneutral service. The facts and arguments are fully stated in the judgment.

*J. H. Kemp* (H.M. Attorney-General for Hong-Kong), for the Crown.

*Eldon Potter*, for the claimants, the owners of the vessel.

GOMPERTZ, ACTING-C.J.—On August 21, 1914, at about 6 P.M., the steamship *Hanametal*, sailing under the American flag, was seized by His Majesty's ship *Triumph*, under the command of Captain FitzMaurice, R.N., and sent to Hong-Kong for adjudication as a prize.

It appears that the *Hanametal* is the property of one William Katz, an American subject, who became the owner by purchase in June, 1913. She is registered in the United States Consulate at Shanghai as an American vessel, and is entitled to the protection of the United States.

When captured the vessel was on a voyage from Shanghai to Tsingtao.



Now the United States of America being a neutral nation, the burden of proving that the *Hanametal* had laid herself open to the condemnation of a Prize Court lies upon the Crown.

The first ground relied upon by the Attorney-General is that this vessel, by proceeding to an enemy port which was liable to be, and which subsequently was in fact, blockaded, with the purpose of taking away refugees, was rendering non-neutral service to the enemy, and thus depriving herself of the protection of a neutral flag. For the removal from a place which must in the near future be besieged and blockaded of a large number of non-combatants is an assistance to the enemy, since it enables the defence to be prolonged.

Permission might of course have been given by the British Government for the removal of refugees, but no such permission had been applied for. If the removal of non-combatants be an operation assisting the defence, the service is one a neutral has no right to render.

See Oppenheim, *International Law* (2nd ed.), vol. ii. p. 193: "And it must be specially observed that no rule of law exists which obliges a besieging force to allow all non-combatants, or only women, children, the aged, sick, and wounded, or subjects of neutral Powers, to leave the besieged locality unmolested. Although such permission is sometimes granted, it is in most cases refused, because the fact that non-combatants are besieged together with the combatants, and that they have to endure the same hardships, may, and very often does, exercise pressure upon the authorities to surrender."

See also Hall, *International Law* (6th ed.), p. 678: "In the transport of persons in the service of a belligerent, the essence of the offence consists in the attempt to help him; if, therefore, this intent can in any way be proved, it is not only immaterial whether the service rendered is important or slight, but it is not even necessary that it shall have an immediate local relation to warlike operations."

So here it is argued that the removal of non-combatants with intent to assist the enemy's operations is a non-neutral service, and this vessel is therefore liable to condemnation.

Counsel for the claimant's reply to this contention is that, carried to its full logical consequences, it means that after the outbreak of war no neutral vessel may take away passengers

from any port of either belligerent, because the port might at some future time be blockaded.

This conclusion the learned Attorney-General did not accept; but I think that his suggestion is that there was here an interposition in the war, an attempt to carry out a wholesale removal on behalf of the enemy Government, a special voyage being undertaken for that purpose.

Now it is noteworthy that neither the text-books—for example, *Hall* and *Oppenheim*—nor the cases on this branch of law there referred to, give any direct support to the doctrine that the carriage of non-combatants from a belligerent port is a non-neutral service. Tsingtao was not, in fact, blockaded until August 27.

The cases of *THE FRIENDSHIP* [1807] (6 C. Rob. 420; 1 Eng. P.C. 599) and *THE OROZEMBO* [1807] (6 C. Rob. 430; 1 Eng. P.C. 605) both deal with the carriage of persons in the military service of the enemy. In the latter case there is a *dictum* of Sir William Scott that, whenever it was of sufficient importance to the enemy that civilian officials should be sent out on public service at the public expense, this circumstance might reasonably be ground for the confiscation. But this *dictum* was not necessary to the decision.

Again, article 45 of the Declaration of London provides for the condemnation of a neutral vessel on a voyage especially undertaken with a view to the transport of individual passengers embodied in the armed forces of the enemy, or if she is transporting a military detachment of the enemy, or one or more persons who, in the course of the voyage, directly assist the operations of the enemy.

The implication would seem to be that the carriage of non-combatant enemy subjects, and of neutrals escaping from an unblockaded enemy port, is in itself innocent and unexceptionable.

It is not every service that may be beneficial to the enemy that is forbidden to a neutral. Medical stores, for instance, are not contraband of war (article 29), and, subject to the right of requisition, a neutral vessel might, in the absence of blockade, freely convey to an enemy a cargo of drugs and surgical dressings. Furthermore, it does not in fact appear that the *Hanametal* had been engaged by the enemy Government to remove refugees. The evidence is that when she left Shanghai

for Tsingtao on August 19 she had permission from the German Government to remove such refugees of any nationality as should desire to leave. There is nothing inconsistent with the duties of a neutral in the carriage of ordinary passengers to or from a belligerent port. On the contrary, the consensus of nations especially favours the continuance during the war of the usual operation of trade by neutral vessels.

In the present case the *Hanametal* had as yet no passengers on board. It is not suggested that the Government of the United States, or that those in charge of the vessel, or her owners, had received notice that passenger traffic by sea from Tsingtao was forbidden to neutral ships. In the absence of such notification I think that a friendly Power would have cause of complaint if an intended operation of this kind not yet carried into effect were, in the complete absence of positive authority, treated by the Courts of Great Britain as a ground of confiscation.

The next ground for consideration that I will deal with is that the *Hanametal* was in the service of the enemy and under belligerent control.

Article 46 of the Declaration of London provides that: "A neutral vessel is liable to condemnation and in a general way to the same treatment as would be applicable to her if she were an enemy merchant vessel. . . . 2. If she is under the orders or control of an agent placed on board by an enemy Government. 3. If she is in the exclusive control of the enemy Government."

First of all it is pointed out that all the European officers, except one, were replaced by Germans upon the outbreak of the war with Great Britain. An account of this is given in the affidavit of John Lennox, a British subject, holding a master's certificate under the Merchant Shipping Acts. He states that he became the master of the *Hanametal* when she was acquired by her present owner in 1913. On or about July 28, 1914, he arrived at Tsingtao with his ship from Chefoo. On August 1 he left Tsingtao for Vladivostock with a cargo of cattle shortly after midnight. At that time his officers consisted of two British subjects, one American, one Norwegian, and one Chinese subject. Almost immediately after he had discharged his pilot off Tsingtao he received signals from the German gunboat *Tiger* ordering him to return to Tsingtao, and he did so. On his return he was informed that no cattle or foodstuffs could be taken out of Tsingtao. He discharged his cargo and waited for instructions.

On or about August 2 the owner, William Katz, came to Tsingtao, and on August 3 informed the master that the German authorities would not allow the British officers to go out through the channel as it was mined, and that a German master and officers would be put on board. On August 5 the master, chief officer, second officer, and chief engineer were replaced by Germans.

By the law of the United States of America a ship wholly owned by an American citizen or American corporation is entitled to fly the American flag, and to American protection. Such ship, while trading in far-Eastern waters, but not doing inter-port trade in the Philippine Islands, may carry a master, officers, and crew of any nationality, and is still entitled to the protection of the United States. The change of officers was made with the permission of the United States Consul at Tsingtao, and was regularly noted in the books of the consulate. Formally, then, everything was in order, and the owner of the vessel was doing no more than the law of his own country permitted him.

But the question is whether the vessel was put into the exclusive control of the enemy Government: was the German master in fact placed on board as an agent of the German Government?

Let us see what followed on this change of officers.

The *Hanametal* had previously to August 3 been on the Vladivostock-Shanghai run, formerly carrying coal; more recently, cattle and a general cargo. After discharging her cargo and changing her officers she left Tsingtao on August 5 for Chefoo with no cargo, her only passengers being a few Chinese coolies. She arrived at Chefoo on August 6, and stayed one night, leaving again on the 7th, reaching Tsingtao on the 8th. On this return voyage she carried neither passengers nor cargo. At Tsingtao the ship coaled, and left on August 9 for Shanghai.

The German master's explanation of these voyages is that the owners hoped to get cargo at Chefoo, where the vessel's arrival had been announced by telegram. He pointed out that Chinese shippers often bring forward cargo after a vessel has arrived in port. He says, too, that there was an expectation of passengers—Chinese residents on the coast who could be thrown into a panic by the war and anxious to reach their houses.

The *Hanametal* reached Shanghai on August 11, and remained there until the 20th. She took in no coal or cargo, but discharged a refrigerating plant she had been carrying in the after-hold. The master explains that this plant was put off because, if the vessel were searched, it might be considered contraband of war. On the 20th the *Hanametal* left Shanghai for Tsingtao, and on that day she was stopped and searched by H.M.S. *Clio*, and was then allowed to proceed. On the 21st she was stopped by H.M.S. *Triumph*, a guard was put on board, and eventually she was taken to Wei-hai Wei.

Now on these facts the case for the Crown is as follows: Immediately after the declaration of war the whole of the deck officers and the chief engineer were changed for Germans. This put the control of the ship in the hands of enemy subjects. The reason given is that, with British officers on board, the vessel would not be allowed to enter or leave a harbour which had been mined for defence. But it is pointed out that other neutral vessels, those under the Japanese flag, were allowed to freely enter and leave Tsingtao under the charge of local pilots. There is one point on which I had felt some difficulty. The chief officer, who was got rid of with the others and at the same time, was not a British but an American subject, and therefore a neutral. There was at the original hearing no direct evidence to clear up this point. But after the adjournment, and while I was considering my judgment, being informed by counsel that Captain Lennox was now in the colony and available as a witness, I took his evidence upon the change of officers. It appears that the chief officer was dismissed, not on account of any representations by the German authorities, but on the British master's own initiative, because he was unsatisfactory in his dealing with the Chinese crew, who disliked him and threatened to leave the ship.

Captain Lennox states that he enquired for neutral officers in Tsingtao, but that there were none available. He himself left by rail for Shanghai with the two British officers, but received a cable at Tsingtao telling him to stand by for instructions. He understood that the British officers would be reinstated after the *Hanametal* had made her last trip into Tsingtao.

The next point is that the voyages of the *Hanametal* after the change of officers give serious grounds for suspicion. She proceeded without cargo, and with only a few coolie passengers

to Chefoo. She returned on the following date to Tsingtao with no passengers, and still without cargo. On the voyage up and back her course would take her close to Wei-hai Wei, a naval station used by the British China Squadron as a coaling base. On both these voyages, and on her way to Shanghai, she might gather information as to the movements of the British fleet of the greatest value to the enemy. She did, in fact, on the return from Shanghai meet three vessels acting under the command of the British admiral—the *Clio* off Shanghai, and further north the *Triumph* and the *Mekong*.

It is argued that these voyages cannot have been the ordinary commercial ventures of a trading vessel, inasmuch as they were, if innocent, quite unprofitable to the owners, and that the presumption is irresistible that she was surrendered to the control of a hostile Government and acting in the service of the enemy. This presumption is stated to receive the strongest possible support from the behaviour of the *Hanametal* when she fell in with H.M. ship *Triumph*. There is an affidavit on the file by the naval commander, Captain FitzMaurice, R.N., to the following effect:

“The *Hanametal* was sighted on August 21, at 6.10 P.M., bearing S.S.E., her course being approximately N.W. The *Triumph* was at the time carrying no colours. At 6.30 P.M. I hoisted German colours, and the *Hanametal* immediately altered course towards me.

“At the time I hoisted German colours we were nearly end on, and might quite possibly have been taken for the German men-of-war *Gneisenau* or *Scharnhorst*.”

This evidence is, of course, extremely important, and I put it to the German master, Hannig, in the witness box, and invited his explanation. [The learned Judge quoted at length from the evidence of the German master and from Captain FitzMaurice's evidence, and continued:] Now if there appears to be a conflict of evidence here, it is, after all, only apparent. For while the British commander believes, as a matter of inference, that the *Hanametal* came towards the *Triumph* for the reasons he gives, the German master specifically denies that he was influenced by these reasons, and he alleges others which seem to me quite as probable an explanation under the circumstances. I will not lay too great stress upon the hoisting of German colours when the vessels were two miles apart. It would seem

to a layman—and was, in effect, admitted by Captain FitzMaurice—that there is a certain similarity of design between the naval ensigns of the two countries. But the suggestion is that, even before that period, the *Hanametal* believed the ships in front of him were German ships. The master, Hannig, positively states that he never took the *Triumph* for anything but a foreign warship, either English or Japanese. I may here state that the Japanese ultimatum to Germany was delivered on August 18 and expired on August 23. The master is an officer of the German Naval Reserve, and has been eight years on the China coast. He swears that he did not, and could not, have mistaken the *Triumph* for the *Scharnhorst*, and he points out certain structural differences which he says would make such a mistake impossible. It is not suggested that there has been any other German war vessel on the station which could possibly be mistaken for the *Scharnhorst* or the *Gneisenau*. The reason he assigns for approaching the men-of-war is at any rate a plausible one—namely, that he knew he would be stopped and searched; that it was evening, and he wanted to have it over as soon as possible. They were, too, heading towards him on opposite courses.

When Captain FitzMaurice says that he does not think a British naval officer would have taken the *Triumph* for a German vessel under the circumstances, am I not bound to accept the apparently reasonable statement of the German master? It seems to me that I cannot do otherwise, and that this suggested ground for suspicion must fail.

Going carefully back over the ground, I find that the evidence is that the officers were changed because the authorities at Tsingtao objected to officers of a belligerent State taking a neutral vessel in and out through their mines. An endeavour was made to find neutral officers without success, and therefore Germans were put in charge. So far there is nothing to justify the conclusion that the owner intended to surrender the control of his ship to any enemy State. It is, of course, just possible that the German master may have assumed control in the interest of his own Government, but the weight of evidence is rather the other way. It points to his being there as the agent in the interests of the neutral owner.

I come next to the voyage from Tsingtao to Chefoo, and back. It is true that this vessel proceeded without cargo and

with no passengers to speak of. But it is stated in evidence, and it may well be believed, that at that time cargo was hard to get on the coast, and that other vessels were obliged to leave port in ballast. The outbreak of a great war notoriously paralyses for the moment ordinary trade operations. Chefoo had been a port of call for the *Hanametal* before the declaration of war. Had American or Norwegian officers been available in Tsingtao, the evidence states that they would have been employed. I do not think that the circumstances that this voyage entailed passing a British naval base would, as against a neutral ship, necessarily justify the conclusion that the vessel was sent out under the control of the enemy.

Putting this part of the case for the Crown at the highest—higher, perhaps, than the Attorney-General cared to put it—it can only be said that the operations of the *Hanametal* were as consistent with a guilty as with an innocent intention. It was suggested that the owner should himself have attended in order to explain the circumstances and shew, if he could, that the *Hanametal's* voyages were made on his service, and not on that of the German Government. But on the whole I think that on this ground no *prima facie* case has been established against him. There is nothing more than suspicion, and suspicion does not carry the case far enough. The suggested ground of confiscation therefore fails.

So far I have been dealing with article 46 of the Declaration of London. The next matter I have to deal with comes under a part of sub-section 1 of article 45.

“A neutral vessel will be condemned, and will in a general way receive the same treatment as a neutral vessel liable to condemnation for carriage of contraband—1. If she is on a voyage specially undertaken with a view to the transmission of intelligence in the interest of the enemy.”

The note of the general report to the naval conference on behalf of the drafting committee is, on this point, as follows:

“The transmission of intelligence in the interest of the enemy is to be treated in the same way as the carriage of passengers embodied in his armed force. The reference to a vessel *especially* undertaking a voyage is intended to shew that the usual service is not meant. She has been turned from her course; she has touched at a port which she does not ordinarily visit, in order to embark the passengers in question. She need



not be *exclusively* devoted to the service of the enemy; that case would come into the second class (article 46 (4)).

“In the two cases just mentioned the vessel has performed but a single service; she has been employed to carry certain people, or to transmit certain intelligence; she is not continually in the service of the enemy. In consequence she may be captured during the voyage on which she is performing the service which she has to render. Once that voyage is finished, all is over, in the sense that she may not be captured for having rendered the service in question. The principle is the same as that recognised in the case of contraband (article 38).”

The question then is whether the voyage from Shanghai to Tsingtao was undertaken in the interests of the enemy Government; to transmit to that Government information gathered at Shanghai, or to convey information gathered on the voyage, as to the movements of His Majesty's ships.

Previous voyages—those from Tsingtao to Chefoo and back to Tsingtao—having been already concluded would not, under this part of the case, constitute a ground of condemnation.

Now there is evidence that when the *Hanametal* left Shanghai the railway between Shanghai and Tsingtao was in order and working, and there is no evidence, nor is it suggested, that the telegraph service between the two places had been interrupted. It was then quite easy for the Government at Tsingtao to procure any information it desired to receive from Shanghai by a more expeditious channel than the sea route. It was unnecessary for the vessel to leave Shanghai for this purpose.

Then was the object of the voyage to carry to Tsingtao information to be gathered on the voyage as to the disposition of the ships of the Allies? The captain and other deck officers were Germans. British, French, and Russian, and probably Japanese men-of-war would be likely to be active in the vicinity of Tsingtao. Two British war vessels and one auxiliary ship were actually encountered on the voyage. Even if no part of the Allied forces was sighted, the mere negative information that they had not been seen in these waters might be of great value to the Germans in Tsingtao.

I think the answer is that the only direct evidence available is that this vessel was proceeding on a trading voyage in itself perfectly lawful. Other neutral vessels (for example, Japanese) had shortly before this date been removing non-combatants from

Tsingtao; and there was nothing to prevent the *Hanametal* also engaging in the traffic. There is no such direct evidence against her as would be required to stamp as illegal an apparently innocent voyage within the ordinary rights of a neutral ship. There is, I think, room for suspicion, but that is not sufficient. Some positive breach of neutrality must be proved before the vessel of a friendly State can be condemned, and here none has been established.

The grounds put forward for confiscation have therefore failed, and it is my duty to order the *Hanametal* to be released. The question of costs and damages I propose to reserve for the present.

I make the order for release, subject to the giving of due security by the owners of the *Hanametal* to pay any costs or expenses they may be ordered to pay.

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[IN THE SUPREME COURT OF NEW SOUTH WALES. IN PRIZE.]

CULLEN, C.J. Dec. 22, 1914.

### THE ZAMBESI.

*British Vessel—Sub-charter to German Government—Innocence of Owners and Charterers—Carriage of Despatches for Enemy—Condemnation of Vessel and Cargo.*

A British vessel was chartered by its owners to a British company having a branch office at Nauru, a German island in the Pacific. On August 6, 1914, the company's agent at Nauru was approached by the German officials and informed that war had broken out between Germany and Russia, and that the German Government wanted a neutral vessel to convey a representative with despatches to the German Government at Rabaul, another German possession. The German officials concealed the fact that Great Britain and Germany were also at war, and accordingly the agent of the British company sub-chartered the vessel to the Imperial German Government for a voyage to Rabaul and back. In the course of the voyage the vessel was encountered by a British cruiser, the documents entrusted to the

*German representative were discovered, and the vessel and her cargo were taken into port as prize:—Held, that although the owners and charterers were innocent, yet, as the vessel had been sub-chartered to, and was engaged in the service of, the enemy Government, and the cargo belonged to the charterers, whose agent had effected the sub-charter, both the vessel and her cargo must be condemned.*

Cause for condemnation of ship and cargo as prize.

The following statement of facts is taken from the judgment: The *Zambesi* is a British steamer of 3,759 gross and 2,431 net registered tonnage. She was registered at the Port of London, her owners being Messrs. Turner, Brightman & Co., a firm consisting of British subjects, residing and carrying on business at London.

By charterparty dated March 10, 1914, the ship was chartered by its owners to the Pacific Phosphate Co., Lim., for one voyage from Japan to Ocean and/or Nauru Islands, and/or any other islands in the Gilbert or Marshall Groups, and thence to Australasian ports, with option to continue the charter for a similar trip from Australia to the islands and back to Australia, on giving notice to the owners within seventy-two hours of the steamer's arrival at the first port of call in Australia from the islands.

The Pacific Phosphate Co., Lim., is a company duly incorporated and registered in England.

Nauru is a small island belonging to the Government of Germany, who were represented there by Herr Wostrack, spoken of in the evidence as Governor. The headquarters of the German Government in this part of the Pacific were at Rabaul, which is several days' sail from Nauru. The Governor at Rabaul had charge of the administration of affairs in what was then known as German New Guinea, and was Herr Wostrack's superior in office. The German Government had wireless stations at Nauru and several other possessions in the Pacific Ocean; the station at Rabaul was not quite completed, but communication was kept up with the other German possessions by means of a wireless installation on the German steamer *Planet*, then lying at Rabaul.

The Phosphate Co. had an office at Melbourne and another at Nauru, at which latter place they were working under a concession obtained from the Government of Germany. The

company's representative at Nauru was a German subject, Rudolf Haefcke, in the employ of the company; and under him was a confidential clerk, Walter Reinhold Storch, a British subject of German parentage. During the latter part of July, 1914, Haefcke had been absent at Rabaul, leaving Storch in charge of the business, but he returned on August 6.

The *Zambesi* sailed under her charter from Sydney on June 25, 1914, and arrived at Nauru on July 7. She left for Ocean Island, a British possession, on the 9th, and arrived at Nauru again on the 25th. From then till August 6 she lay adrift off Nauru awaiting an opportunity of unloading her heavier cargo. This her master had been unable to effect through the rough weather prevailing, the place being simply an open roadstead without a harbour, and cargo having to be put ashore, when practicable, by means of boats. This cargo, which was still on board at the time of capture, is the property of the charterers. As early, at least, as August 5 it was known to the German officials at Nauru, by a wireless communication received, that Germany was at war with Great Britain, France, and Russia.

It also appears that, for several days about that time, wireless communication had failed between Nauru and Rabaul. It therefore became of urgent and vital importance that some other means of communication should be found with the Governor at Rabaul, especially as a large number of wireless messages, in addition to that already mentioned, were being received from Berlin as well as from German possessions in the Pacific, some of which messages were in code, and which must be presumed to have conveyed instructions or necessary information required by the existence of war.

On August 6 Storch was approached by the German officials, and was interviewed, not only by the Governor, but also by Wilhelm Peters, the German master of the police and director of the post, and by Mr. Bosse, who accompanied the Governor. Storch was informed that war had broken out between Germany and Russia, and that the Government wanted a neutral steamer to convey important telegrams to Rabaul, which were to be carried by a Mr. Brauns to the Government there. Brauns was an engineer and an expert in wireless installations, who had been at work in connection with the wireless station at Nauru, and at this time had instructions from the Government to proceed

to Rabaul in order to accelerate the completion of the wireless station there. In the first instance the steamer *Frithjof*, described as a Norwegian ship, was mentioned, but afterwards the *Zambesi* was decided upon. Storch's account is that no mention was made of the fact that war actually existed with Great Britain, and both Wostrack and Peters, who were called as witnesses in opposition to the Crown's claim, agree with him in this respect. Their explanation is that they intentionally concealed the existence of war with Great Britain lest Storch should refuse to allow them the use of the ship. But Storch admits that he did contemplate the possibility of the existence of war with Great Britain.

In a written report to his company, he states that on August 3 he had been approached by Peters and Bosse in order that he might place a vessel at the disposal of the Government to take some important telegrams to Jaluit, another German possession; he adds, "the reasons being that, on account of political affairs, it was necessary to communicate with Jaluit and perhaps Ponape. I put the question, Do these political affairs concern England in any way? I was assured that England was not concerned in the affairs at all."

In the same report he further states as follows: "On August 6, at about 6.30 A.M. I was informed by the Government that war had been declared between Germany and Russia, and was urgently requested to loan *another steamer* for the purpose of sending her to Rabaul *immediately*. It at once occurred to me that there might also be trouble between England and Germany; but though given their word that such was not the case, and that England was not in the trouble, I asked for their request for a steamer in writing, the reason therein being stated that a vessel was required to communicate with Rabaul on account of war between Russia and Germany. . . . I mentioned it would have been out of the question for me, acting on behalf of a British company, to place a vessel at the disposal of the German Government, if England were involved, to which it was agreed. I wished to communicate with the Melbourne office even though I did not suspect that, after the assurance I received, there was trouble between England and Germany. I was told, however, that though open messages (uncoded) would be received by the wireless station, they would, in all probability, not be sent on from Yap, and certainly not for a few days."

A copy of this request in writing is in the following terms (translation):

“Nauru, August 6, 1914.

“In consequence of outbreak of a war between Germany and Russia, I request the Pacific Phosphate Company respectfully to place at the disposal of the Imperial station a steamer, for the purpose of the transmission of important communications to Rabaul.

“WOSTRACK,

Director of the Imperial Station.

“The Pacific Phosphate Company, Nauru.”

The terms of the actual arrangement are as follows (translation):

“The Imperial Station, Nauru, does charter the steamer *Zambesi*, of the Pacific Phosphate Company (Limited), for a voyage to Rabaul and back. The amount of the charter shall be fixed through the Pacific Phosphate Company (Limited), London, with the Imperial Colonial Office, and settled.

“WOSTRACK,

Director of Imperial Station.

“(For the Pacific Phosphate Company);

“WALTER R. STORCH,

Acting Representative at Nauru.

“Nauru, August 6, 1914.”

Having come to this arrangement, Storch wrote a letter in the following terms addressed to Robert Scott, the master of the *Zambesi*:

“The Captain, s.s. *Zambesi*.

“Nauru, August 6, 1914.

“Dear Sir,—We hereby request you to proceed at once to Rabaul to deliver important telegrams, after which you will kindly return to Nauru immediately in the event of your not receiving further instructions from the Government to proceed to another port.

“Yours faithfully,

“(for the Pacific Phosphate Company),

“WALTER R. STORCH,

Acting Representative at Nauru.”

As the *Zambesi* was then some miles off the island, Storch went on board the *Promise*, a smaller vessel lying nearer the shore, which had just arrived from Rabaul with Haefcke on

board, and shewed him the letter which he had written to the master. He spoke to Haefcke about resuming charge, but Haefcke requested him to go on acting until the following day, "as he had much to attend to as regards luggage and things like that." He says also: "I mentioned to Haefcke that the German Governor had asked for a steamer, and gave him the reason; the reason was that, on account of war between Germany and Russia having been declared, the ship was wanted to carry telegrams to Rabaul. I knew that the telegrams were being sent, but what they contained I did not know; I knew that they were being sent in consequence of war. That is in consequence of war between Russia and Germany. I told Haefcke that. Haefcke then told me to proceed with the matter and to comply with the request of the Governor."

After the conversation between Storch and Haefcke, a Mr. Cozens, described as harbour and mooring master in the employ of the company, was sent in the *Promise* with the letter conveying the master's instructions, and this was handed by Cozens to the master on board the *Zambesi*. Brauns accompanied Cozens and was introduced to the master as the person who had charge of the telegrams mentioned in the letter. The master denies any knowledge or suspicion of the existence of war or that he had any knowledge of the nature of the telegrams. He at once started for Rabaul with Brauns on board, and on August 12, as they were approaching Rabaul, he sighted His Majesty's Australian cruiser *Encounter*, who signalled him to stop, and he was boarded by officers from the *Encounter*. Previously, when the cruiser came in sight and was seen to be an English vessel, Brauns, who was in another part of the ship and appeared to be very much agitated, said to Reay, the steward, "I think there is going to be trouble." He then gave Reay a tin wrapped in cloth, saying, "If I say 'all right,' you drop this over the side." Reay concealed the package in his cabin and tried to get into communication with the chief officer and master, but did not succeed in doing so until the officers from the *Encounter* had come on board. He was then told to say what he had to say in the presence of the officers. He stated what had happened, and the package was sent for and found to contain the documents entrusted to Brauns. After questioning Brauns and making further enquiries, the ship was taken possession of and afterwards brought on to Sydney.

Among the documents contained in the package carried by Brauns was a letter in the following terms:

“Imperial Station, Nauru, August 6, 1914.

“Mr. Engineer Brauns at the request of the Imperial Station has declared himself ready and binds himself to deliver the telegrams received to the Imperial Government Rabaul or, in case of need, to destroy them.

“WOSTRACK,

Director of the Imperial Station.”

*Leverrier, K.C., Peden, and Manning, for the Crown.*

*Ralston, K.C., and Brissenden, for the owners of the Zambesi.*

*Broomfield and Coen, for the Pacific Phosphate Co.*

CULLEN, C.J.—Having stated the facts set out above, the learned Judge proceeded: On these facts condemnation of the ship and cargo is claimed on behalf of the Crown.

The grounds of the claim are set out in paragraph 15 of the petition as follows:

“The petitioner charges and the facts are that before and at the time of the capture the said ship *Zambesi* was engaged in unlawful enterprises and transactions, rendering the said ship and her cargo liable to capture and condemnation as lawful prize and in particular—(a.) That the said ship was engaged in trade intercourse and communication with the enemy. (b.) That the said ship was engaged in carrying an enemy agent and enemy despatches. (c.) That the said ship was engaged in the service of the enemy and in the furtherance of his interests. (d.) That the said ship was under the orders and control of the enemy and subservient to his purposes. (e.) That the said ship was in the exclusive employment of the enemy. (f.) That the said ship was exclusively engaged in the transmission of messages and information in the interest of the enemy.”

The defence raised on behalf of the owners and charterers is that neither they nor the persons acting for them were aware of the existence of hostilities between Great Britain and Germany at the time when the vessel was sent from Nauru to Rabaul. They also contend that, even if a neutral ship or cargo were liable to condemnation under the circumstances disclosed in the evidence—which they do not admit—there is no warrant for attaching that consequence in the case of a British ship.



It is clear that unless these defences can be sustained a complete case has been made out for the condemnation claimed. The result of what was done by the agents of the charterers at Nauru was to place the ship at the disposal of the enemy Government for purposes of the most hostile character in connection with the war. Not only was an agent of the enemy Government being carried on a mission for the completion of wireless apparatus at Rabaul, a purpose important to the maintenance of communication between Berlin and the outlying possessions of the German Empire, as well as inter-communication between those possessions themselves and with ships of the enemy carrying wireless apparatus, but the same agent was himself carrying despatches of the utmost importance at the time of capture.

Despatches are described by Lord Stowell (then Sir William Scott) in the case of *THE CAROLINE* [1808] (6 C. Rob., at p. 465; 1 Eng. P.C., at p. 616), as including "all official communications of official persons, on the public affairs of the government." The same learned Judge said in the case of *THE ATALANTA* [1808] (6 C. Rob. 440, at p. 455; 1 Eng. P.C., at p. 609) with reference to the carrying of despatches:

"Nor let it be supposed, that it is an act of light and casual importance. The consequence of such a service is indefinite, infinitely beyond the effect of any contraband that can be conveyed. The carrying of two or three cargoes of stores is necessarily an assistance of a limited nature; but in the transmission of despatches may be conveyed the entire plan of a campaign, that may defeat all the projects of the other belligerent in that quarter of the world."

In furtherance of this end, though no formal charterparty was drawn up with the enemy Government, the arrangement actually made was correctly described by the witnesses as 'a charter of the ship, and it extended not only to the purposes of that voyage, but to such other voyages as might be directed by the Government at Rabaul, in accordance with the letter of instructions handed to the master. Such a service rendered to the enemy would, in the absence of some sufficient defence, expose the vessel to condemnation, even in the case of a neutral owing no allegiance to the British Crown. Much less would a British subject be at liberty in time of war to enter into intercourse with the enemy to the detriment of the interests of his

own country—see *ESPOSITO v. BOWDEN* [1857] (7 E. & B. 763, *per* Mr. Justice Willes at p. 782, quoting from the judgment of Lord Alvanley, C.J., in *FURTADO v. RODGERS* [1802], 3 B. & P. at p. 198). Again, there are many acts open to a neutral which, in the case of a British subject, would entail a forfeiture of his property, as was explained by Dr. Lushington in the case of *THE IONIAN SHIPS* [1855] (2 Spinks, 212, at p. 225):

“Now it may be, as to this head, not unimportant to consider on what ground the property of a British merchant trading with the enemy of Great Britain during war is condemned. We have all the law in the case of *THE HOOP* [1799] (1 C. Rob. 196; 1 Eng. P.C. 104), and in *THE NELLY*, cited in *THE HOOP*. It is upon the ground that such property is taken adhering to the enemy; and therefore, the property being bound not so to adhere, is considered *pro hac vice*, as committing an illegal act. Such property belonging to a neutral, is not adhering to the enemy in the sense which is meant in this judgment, for he has no enemies to adhere to. The prohibition is to British subjects only, or to allies in the war.”

Before considering whether absence of knowledge of the existence of war would be a sufficient defence in the present case, it will be useful to notice the degree of knowledge actually possessed by the company's agents at Nauru.

Both Haefcke and Storch knew of the existence of war between Germany and Russia, yet they were both prepared to hire out a British ship for unneutral service to the prejudice of the Russian Government. It may have been thought that the chance of interference with the ship by a Russian vessel was regarded as too slight to present any risk of capture, for, as Haefcke remarks, “he never heard of Russian warships in the Pacific.” Storch, who was the principal actor in the negotiations, admittedly had the possibility of war with England before his mind, and seems to have thought that he had absolved himself from responsibility by exacting an assurance from the German officials that such was not the case. So intent was he on defining his position that he required them to put in writing their request that he should put the ship at the disposal of the German Government, “in consequence of an outbreak of war between Germany and Russia.” He had been told that what was desired was to get the use of a neutral ship. Whether it was brought to his mind or not that what was really desired was to get the

services of a British ship, he knew that for some reason or other the Governor did not choose to risk sending the despatches in a German ship. But against what danger would a man of his intelligence suppose this precaution to be taken? On the chance that war existed between Germany and Great Britain there would be serious danger of interference on the part of British ships, and the anxiety shewn by the German officials might well have suggested that they had something more in their minds than the rather remote contingency of capture by the Russians. Though I can well understand that it would be a matter of policy on the part of the German officials to conceal the fact of war with Great Britain until the despatches had been sent on their way, it is impossible to acquit Storch of some responsibility in connection with this transaction. If he had the smallest reason to doubt whether war existed with Great Britain, the representatives of her enemy in such a war would, under the circumstances of the case, be the last persons in the world whose assurance would present itself as credible. But, assuming in his favour that a gross imposition was practised on him, the fact remains that it was by the acts of himself and Haefcke that a British ship was placed at the disposal for warlike purposes of a Power that happened at the moment to be actually at war with Great Britain.

It is true that in many cases the actual knowledge possessed by those in control of a ship is the material consideration in deciding whether the acts of those persons render the ship liable to condemnation. Such cases are frequent in the authorities, and some of them are covered by article 45 of the Declaration of London in the case of neutrals. For it must always be remembered that agents of the enemy may obtain most valuable service from a ship without the knowledge of those who have control of her. Such cases frequently arise in connection with the carrying of contraband under circumstances resulting from no act of the persons in control of the ship, and the case of *THE RAPID* [1810] (Edw. 228; 2 Eng. P.C. 45) is one in which similar facts existed in regard to the carrying of despatches. If, for instance, contraband goods are brought and concealed on board without the knowledge of the master, their presence on the ship would be due to no act or omission of his, and it could not be said that their presence there was attributable to any conduct of his, unless, indeed, after discovering the facts,

he omitted to take such action as would clear himself of complicity. But the cases in which the question of knowledge has been held to be the decisive factor are all cases in which the advantage conferred upon a belligerent or his subjects by the act complained of arises merely incidentally in the course of a ship's ordinary occupation. If the same rule is applicable to the present case, then a ship taken from its ordinary occupation and placed at the disposal of a belligerent for the purposes of hostile operations, in such a way as to make it for the time being to all intents and purposes one of his own ships, must be restored to the owners, unless they or the persons in charge of the ship had actual knowledge that they were committing a wrong against the other belligerent. When I speak of persons having control of the ship, I refer in this case particularly to the company's agents at Nauru, because the master was under their orders and accepted their directions affecting the movements of the ship. The case I have put last is analogous to those covered by article 46 of the Declaration of London, dealing with the case of neutral vessels which are in the exclusive employment of the enemy Government, or are exclusively engaged at the time in the transmission of intelligence in the interest of the enemy. In these cases it is provided that the ship is liable to the same treatment as would be applicable to her if she were an enemy merchant vessel.

It is unquestionably a hardship upon an innocent owner if his ship can be placed in such a predicament through some act of folly, timidity, or bad faith on the part of any person to whose immediate control it has passed in consequence of a contract he has lawfully made. But this seems to have been regarded, up to the present, as one of the risks inseparable from the horrible calamity of war. If a combatant were told that he could only spare an instrument bent upon his own destruction at the hazard of being compelled to hand it over afterwards to any blameless individual who might be able to shew prior title, the interests of humanity would probably not be furthered.

The argument presented here on behalf of the owners and charterers seems to assume that in all cases a liability to condemnation rests upon some proved delinquency, and must be regarded as in the nature of a punishment. But if this were so, there would be no foundation for those numerous decisions in which the property of owners has been condemned in

consequence of acts done by the charterers, or their agents, who are in no way under the owners' control, or where owners, or charterers, have had their property condemned as the consequence of acts done by masters, or other agents, outside the legitimate scope of their authority. In the case of *THE OROZEMBO* [1807] (6 C. Rob. 430; 1 Eng. P.C. 605) an American ship, at the time neutral, was ostensibly chartered by a merchant at Lisbon for a lawful voyage, but was fitted up by him for the conveyance of three military officers of the enemy to a port in one of the possessions of Holland, which was then at war with Great Britain. It was argued that there was nothing to affect the master with privity in the transaction, and that it was not a case therefore in which the Court could hold the owner of the vessel responsible for the engagements of any person who could be considered as his agent. Sir William Scott said (at pp. 434-435 in the *Christopher Robinson Reports*; 605-606 in the *English Prize Cases Reports*):

"It has been argued, that the master was ignorant of the character of the service on which he was engaged, and that, in order to support the penalty, it would be necessary that there should be some proof of delinquency in him or his owner. But I conceive that is not necessary; it will be sufficient if there is an injury arising to the belligerent from the employment in which the vessel is found. In the case of the Swedish vessel (the *Carolina*) there was no *mens rea* in the owner, or in any other person acting under his authority. The master was an involuntary agent, acting under compulsion, put upon him by the officers of the French Government, and, so far as intention alone is considered, perfectly innocent. In the same manner, in cases of *bonâ fide* ignorance, there may be no actual delinquency, but if the service is injurious, that will be sufficient to give the belligerent a right to prevent the thing from being done, or at least repeated, by enforcing the penalty of confiscation. If imposition has been practised, it operates as force; and if redress in the way of indemnification is to be sought against any person, it must be against those who have, by means either of compulsion or deceit, exposed the property to danger. If, therefore, it was the most innocent case on the part of the master, if there was nothing whatever to affect him with privity, the whole amount of this argument would be, that he must seek his redress against the freighter; otherwise, such opportunities of

conveyance would be constantly used, and it would be almost impossible, in the greater number of cases, to prove the knowledge and privity of the immediate offender."

In the case of *THE CAROLINA* [1802]. (4 C. Rob. 256; 1 Eng. P.C. 385), referred to in the judgment just cited, a Swedish ship had been used by the French, then at war with England, as a transport for conveying French troops to Egypt. It was urged that, though the master had accepted the orders of the French officials to hold his ship in readiness at the disposal of the French Commissary, he did so under duress, and that the owners were not to be prejudiced under those circumstances. In the judgment Sir William Scott observed upon this:

"It is now, however, said that this was an act under duress, and that it is a by-gone transaction. On the former part of this representation my opinion is that a man cannot be permitted to aver that he was an involuntary agent in such a transaction. If an act of force, exercised by one belligerent on a neutral ship or person, is to be deemed a sufficient justification for any act done by him, contrary to the known duties of the neutral character, there would be an end of any prohibition under the law of nations to carry contraband, or to engage in any other hostile act. If any loss is sustained in such a service, the neutral yielding to such demands must seek redress against the Government that has imposed the restraint upon him. He has no right to expect that the British Government should pay for the injustice of its public enemy. If this vessel had been taken *in delicto*, I should have felt no hesitation in saying that she must have been subject to condemnation. Whether the troops were received on board voluntarily, or involuntarily, could make no difference" (pp. 259-260 in the *Christopher Robinson Reports*; pp. 386-387 in the *English Prize Cases Reports*).

These cases shew that if a ship has been turned *de facto* into an instrument of hostility in the service of the enemy Government by the act of the persons lawfully in charge of her, even though such persons, as well as the owners or charterers, are free from moral delinquency, the consequence of condemnation attaches. The principle to be collected from these and other authorities is that, though the proprietary rights of innocent owners or charterers are not to be prejudiced by the acts of persons other than themselves or those placed in charge of the ship, they are nevertheless amenable to the consequences of acts done by the

latter, and that if these allow themselves to be intimidated or cajoled into rendering services to the enemy, the only remedy, if any, open to the owners or charterers, is against the persons who have led the agents of one or other of them into so false a position.

But, in the present case, the action of the company's agents at Nauru did not stop at the mere carriage of an agent and of despatches which proved to be the agent and despatches of the enemy. The act done was an actual sub-charter of the ship to a Government which, at the time of capture, was an enemy Government. Suppose, for a moment, that the sub-charter had been effected before the declaration of war to a neutral individual, it cannot be disputed on the principles of international law that the property would have been liable to condemnation if afterwards, by the acts of the sub-charterer with knowledge of the war, the ship were placed at the disposal of the enemy Government. If, then, a private individual could expose the owner to this consequence as a result of the acts of his servants, it can hardly be contended that the risk is any the less because the charterer happens to have been the enemy Government itself.

For these reasons I hold that the claim for condemnation must be sustained. This must apply also to the cargo, inasmuch as the acts which are responsible for the condemnation of the ship were the acts of their agents.

I therefore make the decree for condemnation as asked.

In view of all the circumstances of the case I make no order as to costs.

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[IN THE SUPREME COURT OF THE STRAITS SETTLEMENTS. IN PRIZE.]

(Singapore.)

WOODWARD, ACTING-C.J. March 9, 10, 17, 1915.

### THE PONTOPOROS.

*Neutral Vessel—Contraband Cargo for British Government—Capture by the Enemy—Employment as Collier—Unneutral Service—Absence of Mens Rea—Recapture by British—Restoration—Salvage to Re-captors—Naval Prize Act, 1864, s. 40.*

*After the outbreak of war between Great Britain and Germany, a Greek vessel, bound to Karachi with a cargo of coal for the North-Western State Railway of India, was captured as prize by a German cruiser on the ground that the cargo was contraband destined for the British Government. The captain and crew were given the option of discharging their duties on their own vessel, for which they were promised payment, or of going on board the cruiser. They elected to remain, and subsequently were paid, but the Greek master took no further part in the control of his ship. A German officer with an armed escort was put on board, and for some days the vessel was navigated by him in the wake of the cruiser and a German collier accompanying her. The cruiser coaled from the cargo in the Greek vessel, and then steamed away accompanied by the collier. The Greek vessel was then navigated towards the coast of Sumatra by the German officer in charge of her, the Greek master on three occasions being locked in his cabin at night time, and she remained alone for nearly three weeks, when the collier returned, and was in the act of taking more coal from her, when a British cruiser came up and captured both vessels. The collier was sunk together with her cargo, and the Greek vessel was brought in as prize.*

*The Crown claimed condemnation of the vessel on the ground that she had passed into the service of the enemy, and of the cargo on the ground that it was contraband about to be delivered to the enemy :—*

*Held, first, that in the absence of mens rea on the part of the owners, charterers, or master, the mere fact that a neutral vessel is rendering unneutral service is insufficient to condemn her; secondly, that under the circumstances the supplying of coal to the enemy was not to be regarded as "assistance hostile" or unneutral service, as the master was not a free agent, and there was no contractual relationship—which the word "service" implies—between the owners, charterers, or master and the enemy; thirdly, that the recapture operated in favour of the original owners, and the vessel must be restored; fourthly, that the proceeds of sale of the cargo must be paid out to the cargo owners less one-eighth to be deducted as salvage to the re-captors in accordance with section 40 of the Naval Prize Act, 1864.*

*Cause for condemnation of ship and cargo laden therein as prize.*



On September 5, 1914, the s.s. *Pontoporos*, belonging to the National Steam Navigation Co., Lim., a company registered in Athens, Greece, sailed from Calcutta with a cargo of 6,596 tons of coal, the property of Messrs. Bird & Co., a British firm carrying on business in Calcutta, for delivery at Karachi to the North-Western State Railway of India, which belongs to the State Railways Department of the Government of India. The bills of lading for the said cargo were sent overland from Calcutta to Karachi.

On September 10, 1914, the *Pontoporos* was captured in the Bay of Bengal by the German ship of war *Emden* because she was carrying contraband of war for the British Empire from Calcutta to Karachi.

The captain and crew of the *Pontoporos* were given the option of remaining on board their own ship and discharging their duties as usual, for which payment was promised, or of going on board the *Emden*. The captain and crew elected to remain on the *Pontoporos*, and the crew discharged their usual duties; and subsequently, on October 12, 1,000 dollars was paid by the German officer in command of the *Pontoporos* to the Greek captain, D. Polemis, to be divided between himself and his crew in payment of their services.

From September 10 to September 16 the *Pontoporos* was navigated in the wake of the *Emden* and the *Markomannia*—a German steamer which had accompanied the *Emden* as collier since the commencement of the war—and during this period the *Emden* seized and sank several British vessels. On September 16 the *Emden* coaled from the cargo of the *Pontoporos*, and on completion of coaling the *Emden* and the *Markomannia* sailed away. The German officers navigated the *Pontoporos* to the north-east corner of the Island of Simulu off the coast of Sumatra, where she remained alone until October 6, when the *Markomannia* reappeared, came alongside, and commenced to coal from the cargo of the *Pontoporos*.

Coaling continued until October 12, when H.M.S. *Yarmouth* was sighted. The *Markomannia* immediately cut herself loose from the *Pontoporos*, and both vessels proceeded at full steam towards the neighbouring neutral waters. H.M.S. *Yarmouth* fired two shots across their bows, and both vessels came to. The *Markomannia* was boarded and subsequently sunk, together

with all the coal on board, her crew being conveyed to H.M.S. *Yarmouth* as prisoners.

The visiting officers from H.M.S. *Yarmouth* boarded the *Pontoporos*, where they found a reserve sub-lieutenant, a sub-engineer, nine seamen, and three stokers—all belonging to the *Emden*—and First Officer Bahl from the *Markomania*, who was acting as captain of the *Pontoporos*. These were arrested and removed to the *Yarmouth*; the *Pontoporos* was brought as prize first by the *Yarmouth* and then by a French gunboat, *D'Iberville*, to Penang, and from there to Singapore, the port of adjudication.

On December 8, 1914, the *Markomania* and her cargo, including 700 tons of coal which had been taken in from the *Pontoporos*, were pronounced by the Court to have belonged at the time of the capture and seizure thereof to enemies of the Crown and as such subject and liable to confiscation, and the said ship and cargo were condemned as good and lawful prize.

*The Attorney-General* (G. Aubrey Goodman, K.C.) and *Sir Evelyn Ellis*, for the Crown, contended: (a) That, as the *Pontoporos* was used by the enemy for the purpose of supplying coal to the *Emden* and the *Markomania* from September 10 to October 12, 1914, she passed by reason of such user into enemy service, and was liable to be captured and condemned as prize, notwithstanding the fact that she was impressed into such service by violence exercised by the enemy; (b) that there was injury arising to the British belligerent from the use to which the *Pontoporos* had been put, even though the master and crew of the *Pontoporos* may not have assented to such use; (c) that coal is an article of the conditional contraband class, and can be captured and condemned when being delivered to the enemy for the use of the armed forces of the enemy, even though it belongs to a British or neutral subject; (d) that the coal remaining on board the *Pontoporos*, the delivery of which to the *Markomania* was prevented by the capture of the two ships by the *Yarmouth*, should be condemned just as the coal taken on board the *Markomania* from the *Pontoporos* had been condemned, as the same considerations applied.

*C. I. Carver*, for the shipowners, and *C. Everitt*, for the cargo owners, contended: (a) That the hostile acts committed after the capture of the *Pontoporos*—namely, the navigation of the *Pontoporos* as a collier of the *Emden* and the supplying of

coal to the *Emden* and the *Markomannia*—could in no sense be regarded as “unneutral service”; (b) that before a neutral ship could be deemed to have rendered unneutral service there must be the existence of some contractual relation, such as that of employer and employee, between the belligerent and the neutral having authority over the neutral ship; (c) that the case did not fall within the principles laid down in *THE CAROLINA* [1802] (4 C. Rob. 256; 1 Eng. P.C. 385) and *THE OROZEMBO* [1807] (6 C. Rob. 430; 1 Eng. P.C. 605). *Cur. adv. vult.*

*March 17.*—WOODWARD, ACTING-C.J.—The material facts of this case are not in dispute. The *Pontoporos* is a Greek ship owned by the National Steam Navigation Co., Lim., a company registered in Athens. The ship is registered in the name of the owners at the port of Andros.

In July, 1914, she was chartered from the agents of the owners by the British India Steam Navigation Co. to load a cargo of coal at Calcutta on behalf of Messrs. Bird & Co., an English firm, and to proceed with the coal to Karachi. Messrs. Bird & Co. had a contract to supply coal to the North-Western State Railway of India, and in pursuance of this contract about 6,500 tons were shipped, and the *Pontoporos* sailed from Calcutta for Karachi on September 5 last.

On the 10th of that month, while in the Bay of Bengal, she was captured by the German cruiser *Emden*. The ship's papers and documents were seized, and a German officer with an armed escort of German sailors and marines took possession of her. From that date the master took no further part in the control or navigation of the ship; it was under the exclusive control of the German officer, acting under the orders of the commander of the *Emden*. A German engineer was put in charge of the engine room, the chief engineer of the *Pontoporos* being transferred to the *Emden*.

The officers and crew of the ship were compelled to deliver up any arms they had, and a notice was posted in the saloon, in German, English, and French, to the following effect:

“NOTICE.

“During the occupation of this ship by a detachment from a German man-of-war, the ship's crew and passengers are subject to German martial law. Whosoever forwards the interests of Germany's enemies or harms the German Navy during this

occupation incurs death. During this time every offence and every neglect of orders and directions issued on this ship will be punished according to the penal law of the German Empire. Moreover every hostile movement or even the attempt of such an action by any of the crew or passengers may have the most serious consequences for the whole ship, crew and passengers. All arms and ammunition must be handed over immediately. Whoever is found in possession of arms or ammunition in the course of half an hour will be arrested and punished according to the law. Every one of the ship's crew must attend to his usual work till he is dismissed or expressly released therefrom."

After the capture the master and crew were given their choice, by the captors, of remaining on board the ship or being transferred to the *Emden*.

The crew said that they would do what the master did, and the master eventually decided to remain on board the *Pontoporos*, as the German officer told him that if the ship had to be manned by a crew from the *Emden*, as there was no port to which she could be taken, he might in the end have to sink her.

The *Emden* was accompanied by a German steamer, the *Markomannia*, which was acting as collier to her, and the captors navigated the *Pontoporos*, for five days after the capture, in proximity to the *Emden* and the *Markomannia*: an officer from the latter ship came on board the *Pontoporos* on the afternoon of the 10th and took charge of her, in place of the *Emden's* officer. During that day a British steamer, the *Indus*, was captured and sunk. Several other British ships were sunk between the 10th and the 16th. On the latter date the three ships stopped, and the *Emden* was brought alongside the *Pontoporos* and proceeded to coal from the latter's cargo. The master of the *Pontoporos* was taken on board the *Emden*, and there interviewed the commander, who gave him to understand that the lives and safety of himself and the crew depended on their being obedient to orders, but he said that if they remained on board quiet and obedient he would pay him \$1,000—\$500 for himself and \$500 for the crew, or to be divided as he pleased. It does not appear that the master at the time accepted this offer or communicated it to the crew; he returned on board the *Pontoporos*, and informed the crew that he understood from the *Emden's* commander that their safety and eventual release depended upon their conduct.

The *Emden* finished coaling that night. She was coaled by her own crew; none of the crew of the *Pontoporos* assisted. The following morning both the *Emden* and the *Markomania* had disappeared, and the *Pontoporos* was being navigated on a southerly course.

The master says that on three occasions, after the *Emden* had gone, he was locked into his cabin at night time, but when he protested to the German officer in charge this practice was discontinued.

On September 23 they arrived off the Dutch Island of Simolo, and remained under steam about seven miles off the island.

On October 6 the *Markomania* returned, and made fast to the *Pontoporos*, and proceeded to take coal on board from the latter's cargo. A few of the crew of the *Pontoporos* worked with the *Markomania*'s crew; the master of the *Pontoporos* told them they could work if they chose, but that they did so on their own responsibility. He had somewhat of an altercation with the captain of the *Markomania*, who accused him of trying to prevent his crew from working.

The transfer of coal from the holds of the *Pontoporos* to the *Markomania* continued during the daytime till October 12, when H.M.S. *Yarmouth* was sighted. The ropes connecting the *Markomania* with the *Pontoporos* were immediately cut, and both ships proceeded at full speed towards the Dutch coast. They were stopped by shots fired from the *Yarmouth*. The latter came up, and took off the crew of the *Markomania* and sank her. Meantime the Germans on board the *Pontoporos* had thrown their arms and ammunition overboard. Officers from the *Yarmouth* then came on board the *Pontoporos*, and received the ship's papers from the German captain. He and two German naval officers, and twelve seamen belonging to the *Emden*, were arrested and removed to the *Yarmouth*, and the Greek master, D. Polemis, was re-instated as captain of the ship. He then went on board the *Yarmouth*, where he interviewed the commander, and told him what he knew or suspected about the *Emden*'s movements.

Subsequently the *Pontoporos* was brought as a prize, first by the *Yarmouth*, then by a French gunboat, to Penang, and from there to Singapore, where this suit has been instituted for condemnation of the ship and cargo.

It is contended on behalf of the Crown that the ship is liable to condemnation because at the time of her capture she was in the service of the enemy; and though the service was rendered under compulsion, nevertheless she is liable to condemnation because of such service. The service, it is said, consisted in her carrying coal for the enemy; she acted as collier to the *Emden*, and also delivered coal to the *Markomannia*, also a collier of the *Emden*, and was captured in the very act of delivering coal to the *Markomannia*.

The cargo, it is argued, is liable to condemnation because it is conditional contraband under article 24, paragraph 9 of the Declaration of London. Being conditional contraband, if going to the armed forces of the enemy it can be captured and condemned, and *a fortiori* it can be condemned when captured in the act of being delivered to the enemy, or being in actual use by the enemy. It is also contended that if the ship is liable to condemnation for conveying coal to the enemy it must follow that the coal which she was conveying is also liable to be condemned.

It is clear from the authorities that if a neutral ship is chartered or employed by the enemy Government for service connected with the war it will be liable to condemnation on capture. *THE REBECCA* [1807] (2 Acton, 119) has been referred to in argument. In that case a neutral ship was chartered by the enemy Government to take a cargo to a factory of that Government in Japan. She was captured on the voyage, and both ship and cargo were condemned.

There is also the modern case of *THE QUANG-NAM* [1905] (Takahashi, 735; 2 Russian and Japanese Prize Cases, 343)—a French ship, which in 1905 was seized by the Japanese and condemned in their Prize Court on the ground that she had been chartered by the Russian Government, and had been employed in the enemy service in carrying supplies to his fleet, and in reconnoitring on his behalf—see *Pitt Cobbett's Leading Cases on International Law*, Part III. p. 453. The case chiefly relied on as supporting the contention that condemnation must follow, even where the service or employment originated in acts of duress or violence on the part of the belligerent, is *THE CAROLINA* (4 C. Rob. 256; 1 Eng. P.C. 385), and the case of *THE OROZEMBO* (6 C. Rob. 430; 1 Eng. P.C. 605) has been particularly referred

to, the judgment in which case contains a reference to the earlier case of *THE CAROLINA* (4 C. Rob. 256; 1 Eng. P.C. 385).

The present case does not seem to me to fall within the principles laid down in either of these cases, though there are passages in the judgments which might at first sight appear applicable to it; but the judgment must be read with reference to the particular facts of these cases, and the facts of the case before us are entirely different.

In the case of *THE CAROLINA* (4 C. Rob. 256; 1 Eng. P.C. 385), on his arrival at Civita Vecchia, the master was informed that an embargo had been laid on all ships in that port, and that he would have to hold his ship at the disposal of the French Government. He went to Rome to solicit the aid of the Swedish Consul in preventing his ship being so made use of, and during his absence she was fitted up as a transport, and eventually he took on board 150 French dragoons and sailed with fifty-seven other ships for Alexandria. It appears from the judgment that before he sailed from Civita Vecchia the master had acquiesced in the service or employment thus commenced. The learned Judge (Sir W. Scott) says:

"It does not appear that the master made any protest or remonstrance against this service; but rather in proof of his voluntary assent he proceeded to insure the vessel, and to provide the necessary provisions for the voyage. It is now, however, said that this was an act under duress, and that it is a by-gone transaction. On the former part of this representation my opinion is that a man cannot be permitted to aver that he was an involuntary agent in such a transaction. If an act of force exercised by one belligerent on a neutral ship or person is to be deemed a sufficient justification for any act done by him, contrary to the known duties of the neutral character, there would be an end of any prohibition under the law of nations to carry contraband, or to engage in any other hostile act."

Later in his judgment, in dealing with the point of "a by-gone transaction," he says: "I can by no means accede to the description given in argument, or consider her (the ship) as having removed herself from all taint, arising out of the preceding contract."

The act of force referred to by the learned Judge would seem to be the laying of an embargo on the ship, and fitting her up as a transport against the will of the master, and during his

absence; but the facts shew that when he returned he acquiesced in the arrangement, and when he sailed for Alexandria he had bound himself by contract to carry the French dragoons. Some bills of exchange on the French Government, given to him as a reward for his services, were found on board by the captors, and delivery of them was claimed by the master in the Prize Court proceedings, but unsuccessfully. On that point the learned Judge said: "On what ground can it be expected that this Court will bring itself to assist in enforcing a demand for what is to be considered as the *pretium laesae fidei*? Is there a principle more universal than that the Courts of Justice will not carry into effect an illegal contract?"

Five years later, in 1807, the case of *THE OROZEMBO* (6 C. Rob. 430; 1 Eng. P.C. 605) came before the same learned Judge. A neutral ship had been chartered to convey three military officers of distinction and two persons employed in the Civil Departments of the Government of Batavia from Lisbon to Macao, and thence to Batavia. On the way she was captured by a British ship. She carried no cargo, only these passengers. She was condemned on the ground that she must be considered as a transport let out in the service of the Government of Holland. A perusal of the judgment shews how fundamentally different that case was from the present. The *Orozembo* had a fictitious charterparty, purporting to shew that her destination was Macao, whereas in reality it was Batavia. She started from Lisbon on an unlawful voyage, and was liable to capture and condemnation the moment she left that port. There may not have been *mens rea* on the part of the master, but there was on the part of the charterer.

The following passages in the judgment have been particularly referred to in this case: "It has been argued that the master was ignorant of the character of the service on which he was engaged, and that, in order to support the penalty, it would be necessary that there should be some proof of delinquency in him or his owner. But I conceive that is not necessary; it will be sufficient if there is an injury arising to the belligerent from the employment in which the vessel is found." Then the learned Judge goes on to refer to the case of *THE CAROLINA* (4 C. Rob. 256; 1 Eng. P.C. 385), and he says: "In the case of the Swedish vessel there was no *mens rea* in the owner, or in any other person acting under his authority. The master was an involuntary agent, acting under the compulsion put upon him by the



officers of the French Government, and so as far as intention alone is considered perfectly innocent. In the same manner, in cases of *bona fide* ignorance, there may be no actual delinquency; but if the service is injurious, that will be sufficient to give the belligerent a right to prevent the thing from being done, or at least repeated, by enforcing the penalty of confiscation."

The learned Judge held that the ignorance of the master alone was not sufficient to exempt the ship from confiscation; but the facts shew that there was *mens rea* on the part of the charterer, and possibly also the owner, and that the ship was chartered for the very purpose of conveying the passengers in question to an enemy port. He goes on to say, before dealing with some of the facts of the case, "I will first state distinctly that the principle on which I determine this case is, that the carrying of military persons to the colony of an enemy, who are there to take on them the exercise of their military functions, will lead to condemnation. . . ." He then goes on to deal with the facts of the case, and comes to the conclusion that the owner was cognisant with the nature of the transaction, and that the real charterparty was with the Government of Holland.

Both these cases seem to me to differ in principle from the case under consideration. The voyage of the *Carolina* was unneutral from its commencement; she was navigated by her own master under a contract with the French Government which, though it originated in acts of duress, was nevertheless a contract. The master had, though unwillingly, accepted service under the belligerent Government, and his ship was liable to capture and condemnation the moment she left the port of departure. The *Orozembo* also was clearly in the service of the belligerent Government, though the master may have been ignorant of it; the moment she left the port of Lisbon she was sailing on an unlawful voyage.

Then there is the case of *THE SEYERSTADT* [1813] (1 Dod. 241; 2 Eng. P.C. 159). That was a Danish ship which had obtained a licence permitting her to sail with a cargo "from Liverpool to any port in Denmark for clearances." She called at Drontheim and there took on board some noxious goods for the use of the Danish Government, with whom we were at war. This was in manifest violation of the terms of the licence. The captain pleaded that he had been compelled to take the goods on board by the Custom-house officers at Drontheim. In refusing

to entertain this plea the learned Judge said: "I am afraid that it is necessary for the Court to adhere to the rule laid down in the case of *THE CATHERINA MARIA* [1809] (Edw. 338; 2 Eng. P.C. 160*n.*), that the plea of compulsion is inadmissible. It would be impossible for the Court to protect itself otherwise against the incessant attempts which might be made to elude its vigilance by pretence of that nature. It could never discover with certainty whether a transaction taking place in an enemy's port were voluntary or not. Compulsion would always be pleaded, though in many cases the parties might be acting collusively. It is necessary, therefore, to keep the door shut against such explanations."

*THE CATHERINA MARIA* (Edw. 338; 2 Eng. P.C. 160*n.*) was also a case where a vessel which had a licence to proceed in ballast to a port in the Baltic had violated the terms of the licence by taking on a cargo. The plea of compulsion was put forward without avail: the learned Judge said: "What is to become of these Orders in Council if the enemy, by the mere introduction of a force which the master of a merchant vessel cannot resist, is to defeat their operation? Force would in all cases be employed, and in many cases collusively."

In each of these cases the voyage of the ship was of an enemy character from its commencement; in the case of *THE CATHERINA MARIA* (Edw. 338; 2 Eng. P.C. 160*n.*) and *THE SEYERSTADT* (1 Dod. 241; 2 Eng. P.C. 159) an enemy cargo was on board, contrary to the terms of the licence. In the case of *THE CAROLINA* (4 C. Rob. 256; 1 Eng. P.C. 385) and *THE OROZEMBO* (6 C. Rob. 430; 1 Eng. P.C. 605) the ships sailed for the purpose of carrying the armed forces of the enemy. The decisions in *THE CAROLINA* (4 C. Rob. 256; 1 Eng. P.C. 385), *THE CATHERINA MARIA* (Edw. 338; 2 Eng. P.C. 160*n.*), and *THE SEYERSTADT* (1 Dod. 241; 2 Eng. P.C. 159) are in accordance with the principle of the criminal law that duress is no legal excuse for the commission of a crime.

But in the present case the voyage of the *Pontoporos* commenced as a perfectly lawful and innocent voyage: she was chartered by a firm of British subjects to deliver coal to the Indian Government; her cargo was not contraband as against the British Government, it was actually for the use of the Indian Government; it was contraband only as against the enemy Government. She was proceeding on a lawful voyage to a

British port; then came the capture by the enemy and the navigation and control of the ship by the enemy officers. The master never in any way assented, so it seems to me, to anything that was done by the enemy to the ship or the cargo after the capture; he was in fact a prisoner, and the safety of himself and his crew depended on his preserving an attitude of passive inactivity.

I attach no importance to the fact that he eventually received the \$1,000 for himself and the crew. No point was made of that in the arguments addressed to me. The money presumably came from the commander of the *Emden*, though it does not appear who the person was who actually paid it; but it seems to have been paid in fulfilment of a promise by the *Emden's* commander that he would reward the master and crew if the former would prevent the crew from giving trouble. Neither do I attach any significance to the fact that the crew of the *Pontoporos* continued after capture to perform their ordinary duties, and that some few of them helped to coal the *Markomannia*. For the safety of the ship they would have to perform their duties if the crew put on board by the *Emden* was not sufficient for the navigation of the ship; and with regard to the coaling, those who took part in this did not do so under the authority of the master—he refused to order them to assist. The evidence of the crew is that those who helped in the coaling did so unwillingly, under threat of having their allowance of food and water stopped; but what they did does not matter: they were not persons in authority whose conduct would infect the ship with a belligerent character. No doubt the circumstances under which she was captured threw upon the *Pontoporos* the onus of proving that she was not tainted with such character; but in my opinion it has been abundantly proved that the hostile acts committed after the capture—the navigation of the ship as a collier of the *Emden*, and the supplying of coal to the *Emden* and the *Markomannia*—were the acts of the belligerents themselves and not the acts of the master, and they can in no sense be regarded as “unneutral service” or “assistance hostile” within the meaning of those terms as used by the text writers and in the Declaration of London.

In the cases cited, the neutral service was actually performed by the neutral by active conduct on his part, and the voyage was an illegal voyage from the commencement. It is entirely

different where the neutral, having started on a lawful voyage to a British port, is captured and compelled to stand by, an unwilling spectator of, but not a participant in, acts done by the belligerents in their own interests. Reference has been made to *Phillimore's International Law*, vol. iii. p. 460, where the learned author says, in alluding to the case of *THE CAROLINA* (4 C. Rob. 256; 1 Eng. P.C. 385), "So long as she (the ship) continues under the command of the enemy, she remains liable to capture and condemnation." No doubt the *Pontoporos*, when captured, was in command of the enemy, but the passage is to be read, not as an isolated principle of law, but by the light of the whole judgment and the facts of the case.

There are eminent authorities who think that the judgment in *THE CAROLINA* (4 C. Rob. 256; 1 Eng. P.C. 385) was wrong (see *Hall's International Law* (6th ed.), p. 677, footnote; *Westlake's International Law*, Part II. p. 302). If it was wrong to condemn the *Carolina*, *a fortiori* it would be wrong to condemn this ship.

Assuming that the Declaration of London is binding on this Court (though I am not deciding that it is), I hold that this ship does not come under either of the four headings of article 46. This article provides that a neutral vessel is liable to condemnation, and in a general way to the same treatment as would be applicable to her if she were an enemy merchant vessel—first, if she takes a direct part in the hostilities; secondly, if she is under the orders or control of an agent placed on board by the enemy Government; thirdly, if she is in the exclusive employment of the enemy Government; fourthly, if she is exclusively engaged at the time, either in the transport of enemy troops or in the transmission of intelligence in the interest of the enemy.

Articles 45, 46, and 47 are all grouped under the heading "unneutral service" or "assistance hostile," and, in my opinion, the use of that term implies some act or acts in violation of neutrality on the part of a neutral having authority over the neutral vessel, and the existence of some contractual relation, such as that of employer and employee, between the belligerent and such neutral. No such relation existed in this case. It is said that, while article 45 speaks of knowledge on the part of the owner, charterer, or master, article 46 omits knowledge, and that therefore knowledge is not required on the part of these

persons. Yet it is admitted that the offences contemplated under article 46 are more serious than those under article 45. I am satisfied that the construction put by Mr. Oppenheim upon article 46, in the passage referred to by counsel for the shipowners on page 528, that *mens rea* is obviously always in existence and therefore always presumed to be present, is the only reasonable construction of that article.

I am asked to consider that the proceedings are in the nature of an action *in rem* against the ship itself, and that, in construing this article, the ship should be regarded as an "entity" apart from the persons in charge of her, and that the use to which she was put of itself renders her liable to condemnation. I find it impossible to so construe the article. It is not the ship which takes part in the hostilities, but the people in charge of her; nor can the ship herself take orders from, or be the employee of, any Government. The whole article must be read subject to the general heading "unneutral service," and in my opinion the master and crew have succeeded in proving that this ship never performed any unneutral service, because the relation implied by the term "service" never existed between either the owners, the charterers, or the master on the one hand, and the enemy on the other.

If the *Emden's* commander, after capturing her, had put a crew on to her with orders to take her to a German port for confiscation, and she had been recaptured by the *Yarmouth* on the way to such port, it would have been impossible to contend that she was performing unneutral service. As a fact, there was no German port to which he could have sent her, and it suited his purpose to keep her with him and make use of her coal. This action on his part did not divest her of her neutral and innocent character, or alter the character of the voyage on which she had started and which would have been resumed if the master had been a free agent, or operate to transfer the property in her to the captors.

No doubt, if brought before a German Prize Court the ship and cargo would have been condemned, but in the absence of such condemnation there was no transfer of title.

The recapture, under the circumstances, must be held to have operated in favour of the original owners, and I order the ship to be restored to the claimants.

With regard to the cargo, I hold that section 40 of the Naval Prize Act, 1864, applies.<sup>1</sup> As the cargo has been sold the proceeds now in Court must be paid out to the claimants, less one-eighth to be deducted as salvage to the captors. I hold that there were good reasons for the capture of the ship and that the owners are not entitled to compensation under article 64.

No order made as to costs in respect of either the ship or cargo.

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[IN H.B.M. PRIZE COURT FOR EGYPT.]

(Sitting at Alexandria.)

CATOR, P. March 5, 1916.

### THE DERFFLINGER (No. 1).

*Goods on Enemy Ship—Enemy Subject Resident in China—Trade Domicile—Ex-territorial Jurisdiction.*

*European Powers having the privilege of ex-territorial jurisdiction in China, a German subject resident in Shanghai does not acquire a civil domicile in China for war purposes, as he remains subject to the jurisdiction of his own State:—Held, therefore, that the private effects of a German official in Chinese Government service, shipped on board a German vessel for delivery at his home in Germany, were confiscable as enemy property.*

Cause for condemnation of cargo.

The subject-matter of this claim was several cases of private effects, the property of the claimant, H. E. Wolf, a German subject resident at Shanghai and employed in the Chinese Maritime Customs. The goods formed part of the cargo of the German steamship *Derfflinger*, which was seized at Port Said in October,

(1) "Where any ship or goods belonging to any of Her Majesty's subjects, after being taken as prize by the enemy, is or are retaken from the enemy by any of Her Majesty's ships of war, the same shall be restored by decree of a Prize Court to the owner, on his paying as prize salvage one eighth part of the value of the prize to be decreed and ascertained by the Court. . . ."

1914, together with her cargo, and was subsequently condemned as a vessel designed for conversion into a warship. The goods were shipped at Hong Kong before the outbreak of war between Great Britain and Germany and were consigned to the claimant at his home in Stuttgart, *via* a firm of forwarding agents in Bremen.

It was argued on behalf of the claimant that the goods were not liable to condemnation because his domicile was in China, a neutral country, and therefore his goods had a neutral character.

*Arthur Preston (H.B.M. Procurator-General), for the Crown.*

*A. Alexander, for the claimant.*

CATOR, P.—This is a claim made by Mr. H. E. Wolf, a German subject, for the release of a number of cases of porcelain, curios, and other private effects, consigned by him from Hong Kong to a German firm of forwarding agents in Bremen, who had instructions to send them to Mr. Wolf's home in Stuttgart.

Mr. Wolf is employed in the Chinese Maritime Customs at Shanghai, but no special claim is made on account of his employment, and we are to deal with him as a private gentleman forming part of the German community in Shanghai, and no doubt registered at his Consulate as a German subject resident in China. His affidavit declares and emphasises that the goods in question are his private effects intended for private use in his own home in Germany.

On these facts counsel for the claimant has made a very praiseworthy effort to parry the claim of the Crown for confiscation, and has cited a mass of authority to support his contentions. Put shortly his argument is as follows: The principle of commercial domicile which has been elaborated in our Prize Courts applies to private residents as well as to merchants. This domicile in the case of Mr. Wolf is China. China is a neutral country and Mr. Wolf must be treated as a neutral by the Prize Court, and as such is entitled to have his property returned to him even though he has consigned it to himself in Germany. Counsel contends, as I think rightly, that in regard to his first point the mere absence of authority should not weigh heavily against him. In cases of prize the cargoes seized are usually those of traders, and it may be that such a case as the present is new. Moreover, in the case of *THE POSTILION* [1779] (Hay & Marriott, 245;

1 Eng. P.C. 20) the question of enemy character is made dependent on residence. I will, at any rate, assume that Mr. Wolf is entitled to be treated as if he were a trader. But I cannot see how this concession will benefit him, for I have no doubt that his domicile, whether it be called commercial or personal, is not China, but Germany.

The much-quoted case of *THE INDIAN CHIEF* [1800] (3 C. Rob. 12; 1 Eng. P.C. 251), decided by Lord Stowell, is directly in point. We are concerned only with the second part of the judgment—a part which unfortunately has not found a place in the *English Prize Cases*. The question turned upon the position of Europeans in Oriental countries, and on this subject Lord Stowell says, “In the East, from the oldest times, an immiscible character has been kept up; foreigners are not admitted into the general body and mass of the society of the nation; they continue strangers and sojourners as all their fathers were—‘*Doris amara suam non intermiscuit undam*’; not acquiring any national character under the general sovereignty of the country, and not trading under any recognised authority of their own original country, they have been held to derive their present character from that of the association or factory under whose protection they live and carry on their trade” (3 C. Rob., at p. 29).

In those days factories, as they were called, still flourished in the Orient. A factory was a community of Europeans established in a foreign country for the purpose of trade, yet owing no allegiance to the ruler of the soil and not much controlled by any other. Although grouped under the protection of one flag, its members might consist of traders belonging to different nations. An Englishman, for instance, might attach himself to a Dutch factory, and if he did so his trade domicile would for the purpose of a British Prize Court be reckoned Dutch. Since that time the grouping has undergone a change. Communities which in those days were not trading under any recognised authority of their own original country have now sorted themselves out into communities of different nations, definitely controlled by their home Governments, which legislate for them in virtue of rights acquired by custom or definitely conceded by native potentates. The trading bond has given way to one of nationality. But allowing for this difference, the words of Lord Stowell are just as applicable in these days as they were more than a hundred years ago. The waters of Alpheus still



flow undefiled, and where European Powers enjoy the privilege of ex-territorial jurisdiction their subjects never lose their native character. Each community continues its distinctive existence, governed by its own consuls and subject to the laws of its mother country.

Such is the case in China, and such it is here. It is a system with which we in this quarter of the world are quite familiar, for the British Courts in the Ottoman Dominions and Egypt exist solely by virtue of His Majesty's ex-territorial jurisdiction in those countries. Our position is assimilated as nearly as may be to a Crown colony, and in places where the Crown has enjoyed ex-territorial power, and subsequently acquires territorial dominion, the transition to the *status* of a Crown colony can be effected almost insensibly, as I can personally testify from my observation of various phases in that process which have taken place in Zanzibar and East Africa. From time to time questions as to the *status* of British subjects in China and the Ottoman Dominions have come before our Courts, and it has been settled that no British subject can change his legal domicile, by residence in any place where the Crown has ex-territorial authority. That, as we know to our cost, owing to the great inconvenience which it has entailed upon the British community, is, I think, the effect of *In re TOOTAL'S TRUSTS* [1882] (52 L. J. Ch. 664; 23 Ch. D. 532), approved of by the Privy Council in *ABD-UL-MESSIH v. FARRA* [1887] (57 L. J. P.C. 88; 13 App. Cas. 431). These decisions, it is true, relate only to the subtle and artificial doctrine of personal domicile which has been evolved by our civil Courts for the purpose of determining questions relating principally to probate and administration; and a legal domicile for the purpose of a Court of probate is, I need hardly say, a very different thing from a commercial domicile for the purpose of a Prize Court. But *In re TOOTAL'S TRUSTS* (52 L. J. Ch. 664; 23 Ch. D. 532), emphasises the fact that there still exist countries where, owing to fundamental differences in race and religion, Europeans do not merge in the general life of the native inhabitants, but keep themselves apart in separate communities; and where such separation is sanctioned by the exercise of ex-territorial authority I am of opinion that it is impossible for any individual to acquire a trade domicile other than that of the country to which he owes allegiance.

Mr. Wolf is a German subject and a member of the German community in Shanghai, and his domicile for the purpose of these proceedings must be taken to be German. His goods form part of the cargo of an enemy ship which has been confiscated to the Crown, and they must be condemned in like manner. There will be an order for sale in the usual terms.

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[Reported by Norman Bentwich, Esq., Barrister-at-Law.]

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[IN H.B.M. PRIZE COURT FOR EGYPT.]

(Sitting at Alexandria.)

GRAIN, J. March 23, 1915.

### THE CONCADORO.

*Enemy Ship—Offer of Pass to Neutral Port—Condition—Failure to Use Pass—"Circumstance beyond control"—Master's Lack of Funds—Hague Conference, 1907, Convention VI. arts. 1 and 2.*

*An enemy vessel, lying in a belligerent port and entitled to days of grace, was offered a pass to her port of ultimate destination, which was neutral, on condition that she first discharged her cargo at another belligerent port. She refused the offer of the pass and remained in the belligerent port:—Held, that she was subject to condemnation.*

*Held, further, that the allegation of her master that it was impossible for him to proceed on the voyage because he had not sufficient funds, did not bring him within article 2 of the Sixth Hague Convention, which provides that "a merchant ship which owing to circumstances beyond its control may have been unable to leave the enemy port" may not be confiscated, more especially as the master had refused an advance from the consignees of the cargo.*

This was a suit for the condemnation of an Austrian ship seized at Port Said by the Egyptian authorities on October 22, 1914.

The facts are fully stated in the judgment.

Arthur Preston (*H.B.M. Procurator-General*), for the Crown.

F. Leveaux, for the claimants.

GRAIN, J.—The s.s. *Concadoro* is a vessel of 1,813 tons, registered at Trieste and flying the Austrian flag. She has no wireless installation. She is owned by several persons, one of whom is the master of the vessel, an Austrian named Armando Giancovich, who owns five shares out of the twenty-four into which her ownership is divided. All the shareholders are Austrian except two—namely, an Italian and a Servian. This vessel left Cardiff on August 1, 1914, under charter to Messrs. Flack & Son, with a cargo of 1,920 tons of coal consigned to Messrs. Contomichales, Darke & Co., for the Sudan Government.

She arrived at Port Said on August 18, without having called at any port, and in ignorance of the outbreak of war. The master, in his affidavit, states that on his arrival at Port Said he found himself entirely without money to buy coal and provision, as, owing to the war, the managing owner was unable to remit him funds for the purpose of continuing his voyage to Port Sudan, and from there to Basra, which was his ultimate destination. Fearing that if he put to sea he would be captured by British men-of-war, and thinking Port Said would be considered a neutral port, he decided to remain where he was.

On August 30 the master was informed by the captain of the port, Captain Trelawny, that he would not be allowed to proceed through the Canal. This was in consequence of a general order which had been issued at that time for the purpose of the safety of the Canal. On September 15 the master visited Captain Trelawny and was told that he could pass through the Canal to Port Sudan, but the master said he would not do so unless he received a free conduct from Port Sudan, and further states that Captain Trelawny said this could not be done; but Captain Trelawny states that he merely said that he, Captain Trelawny, could not give him one as he thought this would be done by the Sudan Government.

On September 22 Captain Trelawny wrote to the master to the following effect: "I am instructed to inform you as follows:—The coal cargo of the *Concadoro* being required at Port Sudan, you are requested to proceed to that port and discharge it to the consignees' order. If you will agree to do so the Egyptian

Government is authorised by the British Foreign Office to grant you a safe conduct to the said port and from thence to the port of Basra, a neutral port, on the following conditions:—(1) The *Concadoro* must leave Port Said on, or before, the 27th of September and must proceed direct to Port Sudan arriving there not later than 6 days from date of departure from Port Said. (2) She must discharge without delay, the 1,900 tons of patent fuel to the consignees, Messrs. Contomichales, Darke and Coy. and 48 hours after completion must leave Port Sudan for the neutral port named above. (3) The *Concadoro* will be liable to capture in the event of any infringement of the foregoing conditions. You are requested to give me a written answer to this letter as soon as possible and in the event of your acceptance of the conditions named you will be good enough to apply to this office for the safe conduct referred to, at the same time informing me of the date and time you propose to enter the Canal.

“(sgd.) C. E. D. TRELAWNY,

Captain of the Port.”

On the same date the consignees of the cargo wrote to the master that they renewed the offer made on September 17th, that they were prepared to advance money required for payment of Canal dues and disbursements at Port Said, also dues at Port Sudan, in order that the coal on which freight had been paid in advance might be delivered at Port Sudan. And the master, in his evidence, admits that he was offered 530*l.* but considered it insufficient to carry him on to Basra.

On September 23 the master replied to Captain Trelawny: “I beg to thank you for your letter of the 22nd, but in reply regret to inform you that on account of the present political situation I cannot see my way to undertake the voyage to Port Sudan before the end of the hostilities. I can only deliver the cargo here against original bill of lading and signature of bond with deposit for general average.”

On October 22 the vessel was taken out to sea by the Egyptian authorities, and an affidavit of the capture is put in, sworn by Lieutenant Fallowfield of H.M.S. *Baselisk*, dated October 22, 1914. On October 23 the vessel, in charge of a crew from H.M.S. *Warrior*, left Port Said for Port Sudan, where she arrived on October 29 and discharged her cargo. She left Port Sudan on November 11, and the master himself, with the

permission of the British authorities, navigated her to Alexandria, where she arrived on November 17.

The Procurator asks for an order of confiscation and sale on the ground that every facility was given to the vessel to leave Port Said; that from the date of her arrival, August 18, until October 15, neither British nor Egyptian authorities in any way interfered with her or did anything to prevent her leaving the port for the Mediterranean; that on September 22 she was offered free conduct to Port Sudan, and when she had delivered her cargo of coal, of which the freight had already been paid, she was offered a free conduct to Basra, which, according to her charterparty, was her ultimate destination; that in addition to being offered a free conduct, the master was offered an advance of 530*l.* to pay port dues, &c. by the consignees of the cargo, and that as the master had refused all these offers he has only himself to blame if an order of confiscation is now made against him.

Counsel on behalf of the master and the other owners urges that the pass was not a genuine pass, but only a pass for the purpose of getting possession of the coal; that the discharging of the coal was a condition attached to the pass, and that therefore it was not a proper pass under article 1 of Hague Convention No. VI.; also that the preliminary pass was to Port Sudan, a British port, and it ought to have been to a neutral port; and, further, that the master was not told that his vessel would be seized if he did not accept the pass. Counsel also urges that this vessel comes under article 2 of Hague Convention No. VI.—namely, that it is “a merchant ship which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated”—and contends that as the master had not sufficient funds in hand wherewith to buy coal and provisions, she was a ship, owing to circumstances beyond her control, unable to leave an enemy port.

It is also pleaded that the master has invested the savings of his lifetime in the ship, and that as he had no desire to make war on any one it is a great hardship that he should now be deprived of his hard-earned savings.

I should like to say, at once, that I do regret extremely that this man has lost all his lifelong savings through no fault of his own; nevertheless, I cannot help thinking he is more happily circumstanced as a British prisoner of war, where he is well

housed, well fed, and well looked after, than he would have been if he had gone on and arrived at Basra entirely without means and had to remain there until the close of hostilities.

With regard to the other points raised on behalf of the owners, there has been no suggestion that the actual form of the pass would not have been adequate protection had the master accepted it, and I assume it would have been in the form which was given and offered to other enemy ships, and which this Court has already found to be a good and adequate protection against capture at sea. And although a condition was attached to the pass offered—namely, that the master should discharge his cargo at the port to which it was consigned—that condition appears to me to be such a reasonable one that I cannot find otherwise than that it was a proper and adequate pass under the Hague Convention in spite of the condition. Nor am I impressed by the argument that the preliminary pass was to a British port and not a neutral one, because the master was also offered a pass, on the completion of his discharging at the British port, to a neutral port, which was also his port of destination—namely, Basra.

The only other point which requires consideration is: Was the fact that the master was without funds sufficient to bring this case under article 2—namely, “circumstances beyond control”? I am of opinion that it is not sufficient. It appears to me to be stretching the phrase, “beyond control,” to the breaking point to suggest that the owners of a vessel, who have had the whole of their freight paid for before leaving the home port, have not sufficient funds to carry the cargo to the port of destination—namely, Port Sudan; and, moreover, in this case he was actually offered a loan of 530*l*.

I can come to no other conclusion in this case than that this is an enemy ship properly seized as prize, and although, as I have said before, I am extremely sorry for the master who has lost all his savings, nevertheless I am only here to administer the law as I find it. And the order in this case must be an order for confiscation and delivery to the Crown.

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[*Reported by Norman Bentwich, Esq., Barrister-at-Law.*]

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[IN H.B.M. PRIZE COURT FOR EGYPT.]

(Sitting at Alexandria.)

GRAIN, J. May 26, 1915.

## THE BARENFELS (No. 2).

*Cargo—Enemy Consignor—British Consignee—Conditions of Sale—“Documents against acceptance”—Bill of Exchange Accepted after Outbreak of War—Trading with the Enemy—Transaction Void—Public Policy.*

*Before the outbreak of war goods were shipped on a German vessel, by a German consignor, to a British firm in Ceylon to the order of the shippers, “documents against acceptance,” and a bill of exchange was drawn by the sellers on the buyers which was discounted with a bank. After the outbreak of hostilities the British consignees accepted the bill and received the documents from the bank:—Held, that the acceptance of the bill involved a trading with the enemy, and was therefore an illegal transaction, and that consequently the property in the goods remained in the enemy consignors.*

Suit for the condemnation of cargo as prize.

The subject-matter of this claim was several cases of millinery, part of the cargo on the German steamship *Barenfels*, which was captured at Port Said in October, 1914, and ordered by the Prize Court to be detained until the end of the war (see *ante*, p. 122).

A claim for the release of the goods in question was made on behalf of the Chartered Bank of India, Australia, and China, on the ground that the property had passed from the enemy shippers to British buyers, and that the bank, which before the war had discounted a bill drawn on the buyers for the purchase price, was entitled to receive the goods.

It was contended on behalf of the Crown that, inasmuch as after the outbreak of war the buyers had accepted the bill and obtained the shipping documents, the transaction involved a trading with the enemy; that the contract therefore was void; and that the property in the goods remained in the enemy sellers.

The facts and arguments sufficiently appear from the judgment.

*Arthur Preston (H.B.M. Procurator-General)*, for the Crown.  
*G. A. W. Booth*, for the claimants.

GRAIN, J.—In this matter, counsel on behalf of the Chartered Bank of India, Australia, and China claims the release of certain goods on board the s.s. *Barenfels*, on the ground that the ownership has passed to an admitted British firm, Messrs. Diethelm & Co., carrying on business in Colombo, Ceylon.

The Procurator opposes the claim for release on the ground that the property in the goods has not passed to Messrs. Diethelm & Co., and consequently the ownership remains with the consignor, admittedly an enemy firm in enemy country.

The facts are as follows: The goods in question were shipped on board the German steamship *Barenfels* by Messrs. E. G. Kistenmacher & Co., of Leipzig (the sellers), at Hamburg, on July 9, 1914, consigned to Messrs. Geo. Diethelm & Co., of Colombo, Ceylon (the buyers), to the order of the shippers, "documents against acceptance." A bill of exchange for 66*l.* 16*s.* 9*d.* was drawn on Messrs. Diethelm & Co. on July 22, 1914. This draft was duly discounted with the Chartered Bank of India, Australia, and China on the same date, July 22. On August 11, 1914, the bill of exchange was accepted by Messrs. Diethelm & Co. and the documents handed over. The s.s. *Barenfels* has already been dealt with by this Court and an order made for "detention and restoration after the war."

The Procurator argues that the acceptance of this draft on August 11 after the outbreak of war with Germany comes under the law of trading with the enemy, consequently the contract between Kistenmacher & Co., the German firm, and Diethelm & Co., the British firm, has never been completed and is void, and the property in the goods has never passed to the British firm, but remains in the German firm. He quotes in support of his arguments proclamations concerning trading with the enemy of August 5 and September 9, *GRISWOLD v. WADDINGTON* [1819] (16 Johnson's Rep. 438), *SMALL v. LUMPKIN* [1877] (28 Grattan, 832), *KERSHAW v. KELSEY* [1868] (100 Massachusetts, 561) (*Scott's Cases on International Law*, pp. 504, 538, 535), *THE HOOP* [1799] (1 C. Rob. 196; 1 Eng. P.C. 104), and *THE*



PANARIELLOS (*ante*, p. 195) and THE ODESSA (*ante*, p. 163; [1915] P. 52) decided by Sir Samuel Evans in the English Prize Court.

Counsel for the claimants accepts the law as it stands, but maintains that there is no evidence before the Court of any commercial intercourse with the enemy, or passing of money to the enemy, which would bring this case within the law of trading with the enemy; that the acceptance of the draft was no benefit to the enemy firm, it was only a benefit to the British bank, the Chartered Bank of India, and, as that bank had already paid the German firm before the outbreak of war, the acceptance was merely a repayment by a British firm to a British bank on account of money already paid away before the war by the bank; and he further cites the cases already quoted by the Procurator as shewing that the real test, in all these decisions as to what is trading with the enemy, is, Does the transaction confer any benefit on the enemy? And he maintains that in the present case the enemy obtains no benefit whatever by the acceptance of the drafts.

I am satisfied beyond a doubt that the transactions in this case bring it within the law of trading with the enemy. The acceptance of the draft by Messrs. Diethelm & Co. was an essential part of the commercial undertaking between the German firm, Kistenmacher & Co., and the British firm, Diethelm & Co. The German firm agrees to ship and sell the goods and the British firm to buy and pay. The real contract is between those two firms, and therefore the acceptance is part of a commercial undertaking with the enemy, although the actual benefit to the enemy may be remote. The Chartered Bank of India are merely intermediaries who, to assist the German firm, advance money on the security of documents placed in their hands, and consequently are merely pledgees whose claims, in accordance with the decision in THE ODESSA (*ante*, p. 163; [1915] P. 52), cannot be taken into consideration. As the contract in this case was one of "documents against acceptance," the property in the goods does not pass until the acceptance has taken place; and as I am of opinion that the acceptance which took place after the outbreak of war is an act of trading with the enemy and is consequently illegal and void, I hold that for the purposes of this case no acceptance has taken place, and the property in the goods still remains in the German firm and has not passed to the British firm, Diethelm & Co.

It has been suggested by the counsel for the claimants that, even if the acceptance is held to be a trading with the enemy, it would not prevent the passing of the property. I think that he himself thought he had not very solid ground to stand on with regard to that point; but as the point was mentioned, I may as well say that if I am right in deciding that this acceptance amounts to a trading with the enemy I have no hesitation in deciding that the contract completed by the illegal acceptance would be void as being against public policy and injurious to the State, and the contract being void the property in the goods would not pass.

I therefore hold that the goods in question are enemy goods—namely, the property of Messrs. E. G. Kistenmacher & Co. of Leipzig, and strike out the claim of Messrs. Diethelm & Co. and refuse the release to the Chartered Bank.

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[*Reported by Norman Bentwich, Esq., Barrister-at-Law.*]

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[IN H.B.M. PRIZE COURT FOR EGYPT.]

(*Sitting at Alexandria.*)

GRAIN, J. May 26, 1915.

### THE DERFFLINGER (No. 2).

*Cargo on Enemy Vessel—Enemy Consignor—Neutral Consignee—Acceptance of Bill of Exchange before Outbreak of War—Special Conditions of Sale—"No arrival, no sale"—Effect.*

*Where goods, seized as prize, were consigned on an enemy vessel, before the outbreak of war, by an enemy seller to a neutral purchaser who accepted the bill of exchange, and the terms of the contract contained the words "no arrival, no sale,"—Held, that this was a condition inserted for the benefit of the seller, and did not prevent the property passing to the buyer on shipment and acceptance of the bill, and the goods, therefore, being neutral property at the time of seizure, must be released.*

Cause for condemnation of cargo as prize.

The subject-matter of the claim was fifty cases of bristles, part of the cargo of the German steamship *Derfflinger*, shipped at

Tsingtau, China, before the outbreak of war, by a firm of German merchants, and consigned to F. H. Van Stade, an American subject carrying on business in New York. The *Derfflinger* and her cargo were seized as prize at Port Said in October, 1914, and the ship was condemned as being an enemy merchant vessel convertible into a ship of war. The release of the goods in question was claimed by Van Stade on the ground that before capture the property in them had passed to him under the contract of sale. The facts and arguments sufficiently appear from the judgment.

*Arthur Preston (H.B.M. Procurator-General)*, for the Crown.  
*G. A. W. Booth*, for the claimant.

GRAIN, J.—Counsel on behalf of the claimant asks for the release of fifty cases of bristles which were on the German steamship *Derfflinger* when she was seized as a prize of war. The *Derfflinger* has already been dealt with by this Court, and an order made against her of confiscation and delivery to the Crown.

The Procurator appears, and on behalf of the Crown opposes the release, and asks for confiscation of the goods as enemy cargo.

The facts are as follows: On or about June 2, 1914, F. H. Van Stade, an American citizen of New York, bought from a German firm, Eduard Meyer & Co., of Tsingtau, China, fifty cases of Tsingtau bristles, which, on June 23, were shipped on board the *Derfflinger* at Tsingtau, consigned to Van Stade at New York. A bill of exchange for 928*l.* 2*s.* 6*d.* was drawn on Van Stade's account against the London Joint-Stock Bank, London. It was accepted on July 22, bills of lading were handed over, and the bill of exchange was paid on October 31, 1914. The contract of purchase, dated June 2, 1914, between the sellers and Van Stade, the buyer, contains the following provisions: "Terms—This contract is contingent upon strikes, floods, fire, pestilence, riots, war, rebellion and other causes, beyond control. No arrival, no sale. Insurance to be effected by buyers."

The sole point to be decided in this case is how the passing of the property is affected by the words "no arrival, no sale" in the terms of the contract.

The Procurator, on behalf of the Crown, argues that these words constitute a special condition in the contract, and that until the condition has been fulfilled the property in the goods does not pass; that as these goods have not arrived at New York the sale is cancelled, and the property in the goods remains in the sellers, the enemy firm at Tsingtau.

Counsel on behalf of Van Stade urges that the phrase "no arrival, no sale" is merely for the protection of the seller against an action for non-delivery if the goods by any mischance do not arrive. In support of this view counsel put in an affidavit by the claimant, in which he states that the contract was made in the City of New York, and the words "no arrival, no sale" have the well-accepted meaning among merchants engaged in the Chinese trade in this city that if "goods are shipped under the contract, the contract is to be regarded as fulfilled, and the title is in the purchasers whether the goods arrive at their destination or not; so that if goods are lost after shipment, the shipper is not bound to make a new shipment," and he attaches to his affidavit statements to the same effect from six other business firms in New York. It is also urged that if arrival is necessary to establish the ownership of the claimant, an arrival has taken place, as the goods have arrived at the port of Alexandria, and he, the buyer, is here ready to accept and receive them; and it is further urged that in coming to a conclusion in this matter the Court must look to the intention of the parties. In support of the view that the non-arrival does not affect, between the parties themselves, the passing of the property, it is pointed out that in this matter there has been no suggestion that Van Stade has to be paid back his money, nor have Meyer & Co. ever suggested that they should repay.

A phrase from the judgment of the Lords Commissioners of Appeal in the case of *THE SALLY* [1795] (3 C. Rob. 300*n.* at p. 31; 1 Eng. P.C. 28) is cited—namely, "Supposing that it was to become the property of the enemy on delivery, capture is considered as delivery"; and also the following passage from the judgment in *THE COPENHAGEN* [1799] (1 C. Rob. 288; 1 Eng. P.C. 138): "As the captor by his act of seizure has prevented its completion, his seizure shall operate to the same effect as an actual delivery of the goods to the consignee"; but as these statements were made when an entirely different point

of law and fact was being considered, I do not think that they assist us in this case.

It appears to me that in coming to a conclusion in this case one is thrown back on the intentions of the parties to the contract. If it were not for the words "no arrival, no sale," there would be no doubt that the property in the goods passed from Meyer & Co. (the sellers) to Van Stade (the buyer) on July 22, when the draft was accepted and the bills of lading handed over. Have these words, "no arrival, no sale," affected this passing of the property? Was there any intention between the parties that the property should not pass until arrival? It has been suggested that it is necessary to consider at whose risk the goods were, pending their arrival. But, as Sir Samuel Evans says in his judgment in *THE MIRAMICHI* (*ante*, p. 137, at p. 145; [1915] P. 71, at p. 77): "It may be that the element of risk may legitimately enter into the consideration of the question whether the property has passed or has become transferred. But the incidence of risk or loss is not by any means the determining factor of property or ownership—cp. section 20 of the Sale of Goods Act, 1893. The main determining factor is whether, according to the intention of seller and buyer, the property had passed."

There are some American cases in which the words "No arrival, no sale," appear in the contract—namely, *HARRISON v. FORTLAGE* [1896] (161 U.S. 57) and others—but they all appear to be connected with actions for non-delivery; and as I have not had access to the reports, but merely find them cited in text-books, I cannot get much assistance, except that from the meagre details given they do appear to support the theory of the American firms which I have before referred to—namely, that these words are used to relieve the seller on the non-arrival of goods from making another shipment of goods on the same contract.<sup>1</sup>

In this case there appears to me to be no intention whatsoever on the part of the sellers to retain the property in the goods which were comprised in the bill of lading handed over

(1) In *HARRISON v. FORTLAGE*, Grey, J., who delivered the judgment of the Supreme Court, said, dealing with the words "no delivery, no sale," "the whole effect of the clause is that if the goods never arrive at their destination the buyers acquire no property in them, and do not become liable to the sellers for the price" (161 U.S. at p. 64).—EDITOR.

on the bill of exchange being accepted. And in using the words "no arrival, no sale" they merely intended to protect themselves from further responsibility in case of non-arrival—that is, they would not be called upon to ship another consignment.

I am of opinion that in using this phrase the sellers had no intention of reserving any property in the goods; nor, according to the facts placed before me, has the buyer in any way suggested that the property had not passed to him, or that there was any intention in his mind that if the goods did not arrive he had either a right to another shipment or repayment of the money paid.

Under these circumstances I find that it was the intention of the parties that the property in these goods should pass from the sellers to the buyer on July 22, when the bill of exchange was accepted and the documents handed over; that in fact it did then pass; and that therefore these goods are the property of Frederick Van Stade, an American citizen of New York, and that he is entitled to their release.

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[*Reported by Norman Bentwich, Esq., Barrister-at-Law.*]

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[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). May 10, 1915.

THE ORCOMA.

*Practice—Power of Court to Review Decree—Rehearing.*

*The Prize Court has power to review its decrees and to order a rehearing, but the power must be exercised with great caution.*

Motion for an order to set aside a decree of condemnation, and for a rehearing, or in the alternative for leave to enter an appeal from decree of condemnation.

In June, 1914, Colsman, Boehme & Co., a firm carrying on business at Oruro, in Bolivia, shipped for the applicants, Urquidi & Bohrt, mine owners in Bolivia, 721 tons of tin ore

on the British steamship *Orcoma*, consigned to Edgar Colman, Hamburg. On the arrival of the *Orcoma* at Liverpool the cargo was detained as enemy property, and on November 30 intimation to this effect was given by the Customs authorities to H. A. Watson & Co., Colman, Boehme & Co.'s Liverpool brokers, who informed the Customs authorities that the cargo was owned by Urquidi & Bohrt, and that the consignees in Hamburg were merely agents for sale.

Watson & Co. were then referred by the authorities to Batesons, Warr & Wimshurst, solicitors to the Procurator-General in Liverpool. Some correspondence and several interviews took place, and Messrs. Bateson said that they would endeavour to obtain the release of the cargo if Watson & Co. could produce satisfactory evidence that it was not enemy property. Accordingly Watson & Co. communicated with Urquidi & Bohrt, but while the necessary evidence was being obtained in Bolivia the condemnation suit was brought on in London by the Procurator-General without the knowledge of Messrs. Bateson or of Watson & Co., who had not caused an appearance to be entered on the applicants' behalf, as they were unaware that on December 7, 1914, a writ had been issued against the goods.

On April 27, 1915, the suit was heard, and on the documentary evidence filed by the Procurator-General the goods were condemned. On May 3 Watson & Co. learned that the goods had been condemned, and the present motion was then set down.

*J. G. Joseph*, in support of the motion.—No bad faith or negligence is imputed to any one. An honest mistake has been made, but the effect is that goods to which the applicants claim to have a good title have been condemned while the evidence which the Procurator-General's agents had required was being obtained, and in the circumstances there should be a rehearing, with liberty to the applicants to enter an appearance and file their claim.

*H. Stranger*, for the Procurator-General.—The Procurator-General would not like any injustice to be done, but there was a strong case for condemnation on the documents, and it is contrary to the practice to rescind a decree in prize on any ground—*THE ELIZABETH* [1811] (2 Acton, 57; 2 Eng. P.C. 115). See, however, *THE HARMONY* [1807] (2 Acton, 60n.; 2 Eng.

P.C. 115*n.*), where apparently a decree was rescinded, but the grounds were not stated.

[SIR SAMUEL EVANS (THE PRESIDENT) referred to THE VROUW HERMINA [1799] (1 C. Rob. 163; 1 Eng. P.C. 91), where Sir W. Scott said that he would not "go so far as to lay it down universally that it is not in the power of the Court to reconsider its decrees," but the liberty, if it existed, was "a liberty which the Court would exercise with very great caution. . . ."]

If the Court has power, and thinks that this is a proper case to exercise it, the Procurator-General desires the Court itself to hear the evidence, and not to send the case to the Prize Claims Committee.

SIR SAMUEL EVANS (THE PRESIDENT).—What I am going to do in this case must not be taken as laying down any practice, and it must not be regarded as an encouragement to people who have been wanting in watchfulness and activity after cargoes or ships have been seized.

I should be very sorry if in a case like this I had no power to rehear it. I think that I have power, but it must be cautiously used, and will be very cautiously used by me. I think in this particular case that it would not be satisfactory to let the matter remain where it is. A well-known firm in Liverpool were in communication with Messrs. Bateson with reference to this cargo, which they say they could shew belonged to a firm carrying on business in the Republic of Bolivia. Correspondence went on for some time between those gentlemen (Messrs. Watson) and Messrs. Bateson, and the case came on in the ordinary course of things on April 27. Unfortunately the people who were acting for the alleged owners in Bolivia did not cause any appearance to be entered. If they had done so, I think that this difficulty in all probability would have been avoided. But even Messrs. Bateson were not aware that the case was in the list to be heard on April 27. If they had been aware of it, I have no doubt that they would have given that information to Messrs. Watson & Co.

No one is to blame for anything that has been done. Certainly Messrs. Bateson are not to blame; certainly the Procurator-General is not to blame. He cannot be expected to communicate with everybody with whom negotiations for the



production of papers and so forth, which might throw light on the ownership of property seized, have been carried on; each party must do that on their own behalf. But in this case I think, through the fault of nobody at all, that a complete mistake occurred on the part of people who are acting, not for themselves, but as agents for other persons abroad.

If the Bolivian firm are entitled to the goods, and consider that they stand condemned without being heard, under the circumstances I will have this case entered in the list again so that the claim of the parties may be heard, and will give the applicants leave to enter appearance. The claim will come on in the ordinary way.

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*Solicitors*—Treasury Solicitor; Davidson & Morriss, agents for Rogers & Birkett, Liverpool.

[*Reported by E. C. Trehern, Esq., Barrister-at-Law.*

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[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT).

July 12, 15, 16, 20, 21, 22, 23, 26, 29, 30. Aug. 2, 3.

Sept. 16, 1915.

THE KIM. THE ALFRED NOBEL.

THE BJORNSTJERNE BJORNSEN. THE FRIDLAND.

*Neutral Ships — Contraband Cargoes — Conditional and Absolute Contraband — Neutral Port of Destination — Enemy Government or Forces as Ultimate Destination — Doctrine of Continuous Voyage or Transportation — Evidence — Presumptions and Proof — Consignments “to order” — Misdescription of Cargo — Rubber Manifested as “Gum” — Orders in Council of August 20 and October 29, 1914 — Validity and Effect — Declaration of London, 1909, art. 35.*

*The doctrine of continuous voyage or transportation, whether by sea or over land, became part of the law of nations, both as regards the carriage of absolute and of conditional contraband, before the outbreak of the present war. Accordingly, the Prize Court has the duty of determining the real as distinguished from*

*the ostensible destination of goods, absolutely or conditionally contraband, consigned to a neutral port in neutral vessels.*

*Prize Courts are not governed or limited by the strict rules of evidence which bind municipal Courts, and will recognise well-known facts which have come to light in other cases, or as matters of public reputation.*

*Captors must prove facts, from which a reasonable inference of hostile destination can be drawn. But, as regards the ultimate hostile destination of conditional contraband, captors need only shew a highly probable military or Government destination, and need not prove the particular enemy port or place of ultimate destination.*

*It is not incumbent upon captors to prove an intention on the part of the shippers at the commencement of the voyage, ostensibly to a neutral port, of despatching contraband goods to the enemy. If it is reasonably certain that the shippers knew the real ultimate hostile destination, whenever the project may have been conceived, a belligerent has a right to seize and confiscate the goods.*

*If, after the outbreak of war, neutral shippers consign goods of a contraband nature "to order" without naming a consignee, it is a circumstance of suspicion which a Prize Court may take into account in considering whether the goods were really intended for a neutral destination or whether they had an ultimate hostile destination.*

*Contraband articles contaminate the whole cargo belonging to the same owners, and the non-contraband portion must share the fate of the contraband.*

*Any concealment or misdescription calculated and intended by neutrals to deceive belligerents in their right of search for contraband will weigh heavily against those responsible for such practices when the Prize Court has to consider presumptions or inferences as to the real destination of goods of a contraband nature.*

*Rubber, manifested as "gum," released on the facts, the claimants not being responsible for the misdescription.*

*Validity and effect of Orders in Council of August 20 and October 29, 1914, discussed.*

*Four suits, tried together, for the condemnation of cargoes as prize.*

In October and November, 1914, four Scandinavian steamships, under time charters to an American corporation, the Gans Steamship Line, left New York for Copenhagen with large cargoes of lard, hog and meat products, wheat, oil, and other foodstuffs; two of the vessels had consignments of rubber, and one had a consignment of hides. The vessels were the *Kim*, the *Alfred Nobel*, the *Bjornstjerne Bjornson*, and the *Fridland*, all owned by Norwegians except the *Fridland*, which was Swedish owned. They were captured on the voyage by British warships, and their cargoes were seized on the ground that they were conditional contraband destined for the Government or armed forces of Germany; and one cargo of rubber was seized as being absolute contraband destined for enemy territory.

[The Crown also claimed condemnation of the ships on the ground that their cargoes were as to more than 50 per cent. contraband, and, as regards the *Kim* and the *Fridland*, on the further ground that they carried false papers, their consignments of rubber being manifested as "gum"; but the arguments as to the confiscability of the ships were adjourned until after the decision in the cargo claims.]

Four large American firms, Armour & Co., Morris & Co. (with Stern & Co. a subsidiary company), Hammond & Co. (with Swift & Co.), and Sulzberger & Sons Co., were consignors of lard and meat products on the four vessels to the extent of 22,545,205 lb., and another firm, Cudahy & Co., on two of the vessels to the extent of 729,379 lb.

A large number of consignors and alleged purchasers entered claims, the following analysis of which is taken from the judgment:

## I.

## "MORRIS AND CO. (With Stern and Co.)

	lb.	lb.
Direct claims by these companies to goods laden in the four ships amounting to .		5,176,327
Other sub-claims by claimants who allege that they had bought and had become owners of goods consigned by the above companies:		

## (1) PAX AND CO.

Goods in the <i>Alfred Nobel</i> and the <i>Bjornstjerne Bjornson</i> . . . . .	411,660	
	<hr/>	411,660

Carried forward . . .	5,587,987
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	lb.	lb.
Brought forward . . . .		5,587,987
(2) CHRISTENSEN AND THOEGESEN.		
Goods in the <i>Alfred Nobel</i> and the <i>Bjornstjerne Bjornson</i> . . . .	110,428	
(3) BRODE LEVY.		
Goods in the <i>Alfred Nobel</i> , the <i>Bjornstjerne</i> <i>Bjornson</i> , and the <i>Kim</i> . . . .	132,036	
(4) J. O. HANSEN.		
Goods in the <i>Bjornstjerne Bjornson</i> , <i>Frid-</i> <i>land</i> , and <i>Kim</i> . . . . .	196,873	
(5) SEGELCKE.		
Goods in the <i>Bjornstjerne Bjornson</i> and the <i>Kim</i> . . . . .	275,297	
(6) PEDERSEN.		
Goods in the <i>Bjornstjerne Bjornson</i> . . . .	45,219	
(7) HENRIQUES AND ZOYDNER.		
Goods in the <i>Bjornstjerne Bjornson</i> . . . .	81,096	
(8) KORSOR MARGARIN FABRIK.		
Goods in the <i>Fridland</i> and <i>Kim</i> . . . .	26,639	
(9) MARGARIN FABRIK DANIA.		
Goods in the <i>Fridland</i> . . . . .	9,004	
(10) ERIK VALEUR.		
Goods in the <i>Kim</i> . . . . .	106,155	
	<hr/>	1,394,407
		<hr/>
		6,570,734

## II.

## “ ARMOUR AND CO.

	lb.	lb.
Direct claims by this company to goods laden in the four ships amounting to		7,819,003
Other sub-claims by claimants who allege that they bought and became owners of goods consigned by Armour and Co. as follows :		
(1) PROVISION IMPORT CO.		
Goods in the <i>Alfred Nobel</i> and the <i>Fridland</i> . . . . .	1,176,050	
(2) CHRISTENSEN AND THOEGESEN.		
Goods in the <i>Fridland</i> . . . . .	244,000	
(3) BRODE LEVY.		
Goods in the <i>Kim</i> . . . . .	231,391	
(4) J. O. HANSEN.		
Goods in the <i>Kim</i> . . . . .	203,752	
(5) FRIGAST.		
Goods in the <i>Bjornstjerne Bjornson</i> . . . .	15,750	
	<hr/>	1,870,943
		<hr/>
		9,689,946

## III.

## “ SWIFT AND CO. AND HAMMOND AND CO.

	lb.	lb.
Direct claims by these companies to goods laden in the four ships . . . . .		2,512,912
Other sub-claims by claimants who allege that they had bought and had become owners of goods consigned by the above companies :		
(1) BUCH AND Co.		
Goods in the <i>Bjornstjerne Bjornson</i> , the <i>Fridland</i> , and the <i>Kim</i> . . . . .	752,908	
(2) BUNCHS FED.		
Goods in the <i>Fridland</i> . . . . .	3,371	
	<hr/>	756,279
		<hr/>
		3,269,191

## IV.

## “ SULZBERGER AND SONS CO.

	lb.	lb.
Direct claims by this company to goods laden in the four ships . . . . .		1,700,281
Other sub-claims by claimants who allege that they had bought and had become the owners of goods consigned by the above company :		
(1) PAY AND Co.		
Goods in the four ships . . . . .	845,783	
(2) V. ELWARTH.		
Goods in the <i>Alfred Nobel</i> . . . . .	88,618	
	<hr/>	934,401
		<hr/>
		2,634,682

## V.

## “ CUDAHY AND CO.

	lb.	lb.
Direct claims by this company to goods laden in the <i>Alfred Nobel</i> and the <i>Fridland</i> . . . . .		176,559
Other sub-claims by claimants who allege that they had bought and had become the owners of goods consigned by the above company :		
(1) CHRISTENSEN AND THOEGERSEN.		
Goods in the <i>Alfred Nobel</i> and the <i>Fridland</i> . . . . .	594,682	
(2) V. ELWARTH.		
Goods in the <i>Alfred Nobel</i> . . . . .	61,000	
	<hr/>	655,682
		<hr/>
		832,241

" These five claimants were the shippers and consignors of the goods ; they allege that the goods had remained their property, and base their claims upon ownership at the time of seizure.

" The other claimants are persons or firms—chiefly in Denmark—who claim that they had become the purchasers of goods laden on the various vessels. They are as follow :

" A.—PAY AND Co. claim goods laden in the four vessels amounting to 1,710,868 lb. They claim as having bought from (1) Morris and Co., (2) Sulzberger and Sons Co., and (3) the South Cotton Oil Co. The goods these claimants say they bought were lard, cotton oil, beef casings, and oleo stock.

" B.—THE PROVISION IMPORT COMPANY claim goods in the *Alfred Nobel* and the *Fridland* amounting to 1,176,050 lb. They claim as having bought from Armour and Co. The goods consist of lard and oleo stock.

" C.—CHRISTENSEN AND THOEGERSEN claim goods in the *Alfred Nobel*, the *Bjornstjerne Bjornson*, and the *Fridland* amounting to 949,110 lb. They claim as having bought from (1) Morris and Co., (2) Cudahy and Co., and (3) Armour and Co. The goods consist of lard and casings.

" D.—BRODR LEVY claim goods in the *Alfred Nobel*, the *Bjornstjerne Bjornson*, and the *Kim* amounting to 363,427 lb. They claim as having bought from (1) Morris and Co., and (2) Armour and Co. The goods consist of lard and of fat backs.

" E.—VILHELM ELWARTH claims goods in the *Alfred Nobel* amounting to 149,618 lb. He claims as having bought from (1) the Consolidated Rendering Company and (2) Cudahy and Co. The goods consist of lard and of oleo stock.

" F.—BUCH AND Co. claim goods in the *Bjornstjerne Bjornson*, the *Fridland*, and the *Kim* amounting to 752,908 lb. They claim as having bought from Hammond and Co. The goods consist of lard, fat backs, and smoked bacon.

" G.—J. O. HANSEN claims goods in the *Bjornstjerne Bjornson*, the *Fridland* and the *Kim* amounting to 400,625 lb. He claims as having bought from (1) Morris and Co. and (2) Armour and Co. The goods consist of lard and of fat backs.

" H.—SEGELCKE claims goods in the *Bjornstjerne Bjornson* and the *Kim* amounting to 275,297 lb. He claims as having bought from Morris and Co. The goods consist of lards.

" J.—PEDERSEN claims (for the Faellesforingen Company) goods in the *Bjornstjerne Bjornson* amounting to 45,219 lb. He claims as having bought from Morris and Co. The goods consist of lards.

" K.—HENRIQUES AND ZOYDNER claim goods in the *Bjornstjerne Bjornson* amounting to 81,096 lb. They claim as having bought from Morris and Co. The goods consist of lards.

" L.—FRIGAST claims goods on the *Bjornstjerne Bjornson* amounting to 15,750 lb. He claims as having bought from Armour and Co. The goods consist of lards.

" M.—KORSOR MARGARIN FABRIK claim goods in the *Fridland* and the *Kim* amounting to 26,639 lb. They claim as having bought from Morris and Co. The goods consist of oleo stock.

" N.—THE MARGARIN FABRIK DANIA claim goods shipped in the *Fridland* amounting to 9,004 lb. They claim as having bought from Morris and Co. The goods consist of lard.

" O.—BUNCH'S FED claim goods in the *Fridland* amounting to 3,371 lb. They claim as having bought from Christensen and Thøgersen goods shipped by Hammond and Co. The goods consist of beef tongues.

"P.—ERIK VALEUR claims goods in the *Kim* amounting to 106,155 lb. He claims as having bought from Morris and Co. The goods are oleo stock.

"Q.—CHRISTIAN LOEHR claims goods in the *Alfred Nobel* amounting to 41,952 lb. He claims as having bought from the Provision Import Company goods shipped by Rumsay and Co. The goods consist of lard.

"R.—J. ULLMANN AND Co. claim rubber in the *Fridland* and the *Kim* amounting to 137,637 lb. They claim as having bought the rubber from E. Maurer and Co.

"S.—W. T. BAIRD claims rubber in the *Kim* amounting to 29,771 lb. He claims the rubber which he himself had consigned to Fritsch, of Landskrona.

"T.—MARCUS AND Co. claim hides in the *Kim* amounting to 18,968 lb. They claim as having bought the hides from Amsinck and Co. or through them from Goldtree and Liebes, of Santa Ana.

"U.—THE GUARANTY TRUST Co., of New York, claim (with Newman) goods in the *Alfred Nobel*, and (with Morris and Co.) goods on the *Bjornstjerne Bjornson* and the *Fridland* amounting to 8,795,108 lb. They claim as consignors of the goods, which consist of wheat and flour."

Stated generally, the case for the Crown was that, since the outbreak of war between Great Britain and Germany, direct trade from America to German ports had practically ceased, and that Copenhagen had been turned into a depôt for the transportation of foodstuffs and other contraband goods from America to the German Government and forces; that the consignees and alleged purchasers were merely agents for the purpose of the transportation; and that the doctrine of continuous voyage applied.

The case for the claimants, according to their affidavits, was that the goods were shipped to Copenhagen either to agents for sale to Scandinavian purchasers or, in the case of the purchaser-claimants, that they had *bona fide* bought the goods to dispose of to customers in the ordinary course of business. But during the hearing it was admitted by counsel on behalf of some of the claimants that a very large quantity of the goods ultimately would have gone to Germany—not, it was said, to the German Government or forces—but to the civil population, who could no longer obtain supplies of foodstuffs, &c., from America *via* Hamburg or other German ports.

The facts relating to the individual claims appear in the judgment.

*The Attorney-General (Sir Edward Carson, K.C.), The Solicitor-General (Sir F. E. Smith, K.C.), Cave, K.C., R. A. Wright, Pearce Higgins, and J. Wylie for the Crown.*

*Sir Robert Finlay, K.C.*, with *Laing, K.C.*, and *Raeburn*, for *Armour & Co.*, and with *Leslie Scott, K.C.*, and *Raeburn* for various Danish consignees.

*Leslie Scott, K.C.*, with *C. R. Dunlop*, for *Morris & Co.* and *Stern & Co.*, and with *Balloch* for the owners of the *Fridland*.

*Pollock, K.C.*, and *Lowenthal* for *Hammond & Co.* and *Swift & Co.*

*Maurice Hill, K.C.*, with *A. Neilson*, for *Sulzberger & Sons Co.*, and with *John B. Aspinall* for the *Cudahy Packing Co.*

*Dawson Miller, K.C.*, and *A. Neilson* for *J. Ullmann & Co.* in respect of consignments of rubber on the *Fridland*.

*E. W. Brightman* for *J. Ullmann & Co.* in respect of consignments of rubber on the *Kim*.

*Douglas Hogg* and *Fortune* for *Baird & Co.*

*Dumas* for the *Guaranty Trust Co.*, other shippers of grain, and various consignees.

*Roche, K.C.*, and *Balloch* for the owners of the *Kim*, the *Alfred Nobel*, and the *Bjornstjerne Bjornson*.

*Bateson, K.C.*, and *D. Stephens*, and *Mackinnon, K.C.*, and *Raeburn*, for *Fearon, Brown & Co.* in respect of cargoes of wheat on the *Kim* and the *Alfred Nobel*. These claims were settled in the course of the hearing.

*The Attorney-General (Sir Edward Carson, K.C.)*, and *The Solicitor-General (Sir F. E. Smith, K.C.)*.—The law appertaining to the cargoes in the *Alfred Nobel*, the *Bjornstjerne Bjornson*, and the *Fridland* is the law of nations modified by the Declaration of London, as put in force by an Order in Council of August 20, 1914. The law applicable to the cargoes in the *Kim* is the law of nations modified by the Declaration of London, as dealt with by an Order in Council of October 29, 1914.

Under the Declaration the liability to capture in the case of absolute contraband arose on its being shewn that the contraband goods were destined for enemy territory or forces, and the doctrine of continuous voyage, as developed by decisions of the American Prize Courts, was in force—that is, it was immaterial that the carriage of the goods to their ultimate destination entailed transshipment or transport by land (article 30). Conditional contraband—under which foodstuffs are classed (article 24)—could be captured on its being shewn that the goods



were destined for the use either of the armed forces or of a Government department of the enemy State (article 33); and such destination was presumed if the goods were consigned to enemy authorities, or to a contractor established in enemy country, who, as a matter of common knowledge, supplied articles of this kind to the enemy, or to a fortified place belonging to the enemy, or to a place serving as a base for the armed forces of the enemy (article 34). Under the Declaration conditional contraband was not liable to capture except when found on a vessel bound for enemy territory, and when it was not to be discharged in an intervening neutral port (article 35). Therefore, under the Declaration of London, all these goods would have been free had it not been for the deceit practised by the claimants in the setting up of bogus neutral consignees, and in the underlying pretence that the goods were not to go to Germany at all.

[SIR SAMUEL EVANS (THE PRESIDENT).—You say there is an element of fraud in that, but to whom was any representation made as to whether the goods were going to Germany?]

The whole of the arrangements made constituted representations that the goods were not intended to go to Germany. The claimants have created a state of facts to which they could point in the event of capture, and until that happened there were no circumstances under which representations would be necessary.

Under a proclamation of August 4, 1914, there are lists of absolute and conditional contraband, which are practically in the same terms as in the corresponding lists in the Declaration, and by the Order in Council of August 20 the provisions of the Declaration of London were adopted with additions and modifications. The lists of absolute and conditional contraband contained in the Declaration were superseded by the lists of August 4; and, as regards the destination of conditional contraband for the enemy forces or the enemy Government, in addition to the presumptions contained in article 34, such destination might be inferred from "any sufficient evidence," and could be presumed if the goods were consigned "to or for an agent of the enemy State" or "to or for a merchant or other person under the control of the enemy State." Further, the doctrine of continuous voyage was revised as regards conditional contraband, which, notwithstanding article 35 of the

Declaration, if shewn to be destined for the use of the enemy forces or Government, was liable to capture, to whatever port the vessel was bound and at whatever port the cargo was to be discharged. On September 21, 1914, a proclamation was published, by which rubber, hides, and skins were declared conditional contraband. At the period, therefore, when the *Alfred Nobel*, the *Bjornstjerne Bjornson*, and the *Fridland* sailed, on various dates before October 29, foodstuffs, rubber, and hides were all conditional contraband, and the doctrine of continuous voyage applied to them.

But on October 29 another proclamation and an Order in Council were issued. The proclamation revised the lists of contraband, and in place of those of August 4 and September 21 substituted new lists, under which rubber became absolutely contraband, foodstuffs still remaining conditionally contraband. By the Order in Council (known as the Declaration of London Order in Council (No. 2)), which recites that it is desirable to re-enact the Order in Council of August 20 with amendments in order to minimise, so far as possible, the interference with innocent neutral trade, the provisions of the Declaration of London, subject to the exclusion of the lists of contraband and non-contraband and to other modifications, are adopted, and the Order of August 20 is repealed. From this date, therefore, the unqualified assertion of the doctrine of continuous voyage to conditional contraband has gone. In its place there is article 35 of the Declaration. But the Order in Council retains the presumption of destination, which may be inferred from consignment to or for an agent of the enemy State, and further provides that, "notwithstanding the provisions of article 35 of the said Declaration, conditional contraband shall be liable to capture on board a vessel bound for a neutral port if the goods are consigned 'to order,' or if the ship's papers do not shew who is the consignee of the goods, or if they shew a consignee of the goods in territory belonging to or occupied by the enemy," and in these cases "it shall lie upon the owners of the goods to prove that their destination was innocent."

Such was the position when the *Kim* sailed on November 11 with foodstuffs, which were conditional contraband, and rubber, which was absolute contraband.

The principle on which the American decisions on the doctrine of continuous voyage were decided was that a belli-

gerent has the right to prevent a neutral carrying on a contraband trade with his enemy; but the doctrine is not entirely of American origin, as Lord Stowell and Sir William Grant had both applied the principle to the attempts to evade the restrictions on Colonial trade—see *THE WILLIAM*, [1806] (5 C. Rob. 385; 1 Eng. P.C. 505). The doctrine was also applied to trading with the enemy in *THE JONGE PIETER* [1801] (4 C. Rob. 79; 1 Eng. P.C. 353), where it was held that if British goods were shipped on a British ship to a neutral port, and the intention was proved that they were to be conveyed by some internal means of communication to an enemy destination, such property would be condemned. See also *THE COMMERCE* [1816] (1 Wheaton, 382), where the Supreme Court of the United States considered the question of contraband in connection with a voyage which was not directly to an enemy port.

The doctrine was extended, however, during the American Civil War, when the Confederates established branches in United Kingdom ports and in various West India Islands and Mexico, the practice being to establish importing houses at these depôts in connection with mercantile firms in Europe, British merchants in particular being actively engaged in this trade. Diplomatic protests were addressed to the British authorities, but Lord Russell, in a reply which he made to Mr. Adams in May, 1862, pointed out the correct view when he said, "It is not for Her Majesty's Government to do that which belongs to the cruisers and the Courts of the United States to do for themselves" (see *Moore's International Law Digest*, vol. 7, pp. 698-9).

The first of the American cases decided during the Civil War was *THE DOLPHIN* [1863] (7 Fed. Cas. 868; *Moore's International Law Journal*, vol. 7, p. 700). This was followed by *THE STEPHEN HART* [1863] (Blatch. Pr. Cas. 387), a case decided by the United States District Court and affirmed on appeal, [1865] (3 Wall. 559), in which the same principles were involved as in *THE SPRINGBOK* [1866] (5 Wall. 1) and *THE PETERHOFF* [1866] (5 Wall. 28). Betts, J., said in *THE STEPHEN HART* (Blatch. Pr. Cas., at p. 404): "The cases of the *Stephen Hart*, the *Springbok*, the *Peterhoff*, and the *Gertrude*, illustrate a course of trade which has sprung up during the present war, and of which this court will take judicial cognisance. . . . Neutral ports have suddenly been

raised from ports of comparatively insignificant trade to marts of the first magnitude. . . . The character and course of this trade, and its sudden rise, are very properly commented upon in a despatch from the Secretary of State of the United States to Lord Lyons, of the 12th May, 1863. The broad issue upon the merits of this case is, whether the adventure of the *Stephen Hart* was the honest voyage of a neutral vessel from one neutral port to another neutral, carrying neutral goods between those two ports only, or was a simulated voyage, the cargo being contraband of war, and being really destined for the use of the enemy, and to be introduced into the enemy's country by a breach of blockade by the *Stephen Hart*, or by trans-shipment from her to another vessel at Cardenas."

[SIR SAMUEL EVANS (THE PRESIDENT).—That case only deals with the sea voyage. There is no question arising there as to transportation overland.]

No; but it can make no difference to the principle of liability whether the further carriage is by sea or land. If any part of the voyage is illegal, the neutral who is defeating the right of the belligerent cannot be better off where, instead of making the second part of the voyage by sea, he uses methods of land conveyance.

In *THE PETERHOFF* (5 Wall., at p. 59) the Court said that "while articles, not contraband, might be sent to Matamoras and beyond to the rebel region, where the communications were not interrupted by blockade, articles of a contraband character, destined in fact to a State in rebellion, or for the use of the rebel military forces, were liable to capture though primarily destined to Matamoras. We are obliged to conclude that the portion of cargo which we have characterised as contraband must be condemned."

In *THE SPRINGBOK* (5 Wall. 1) the Court had to deal with bills of lading such as were used in the present cases—namely, "to order"—and said, "What then was the real intention? That some other destination than Nassau was intended may be inferred from the fact that the consignment shewn by the bills of lading and the manifest was "to order or assigns." It would perhaps have been better to say that it was one of several circumstances upon which the inference might be founded—see also *THE BERMUDA* [1865] (3 Wall. 514).

The decision in *THE SPRINGBOK* (5 Wall. 1) caused the British merchants to make representations to the American authorities, complaining that these doctrines were subversive of the rights of neutrals as those rights had hitherto been understood, and they urged upon the British Government that it was their duty to consider the judgment of Judge Betts. Lord Russell, on February 20, 1864, instructed Lord Lyons, the British Minister at Washington, that Her Majesty's Government had considered the judgment in communication with the law officers of the Crown, and saw no reason to change the opinion that they "could not officially interfere in the matter. On the contrary, a careful perusal of this elaborate and able judgment, containing the reasons of the judge, the authorities cited by him in support of it, and the important evidence properly invoked from the cases of *THE STEPHEN HART* and *THE GERTRUDE* (which Her Majesty's Government have now seen for the first time), in which the same parties were concerned, goes so far as to establish that the cargo of the *Springbok*, containing a considerable portion of contraband, was never really and *bona fide* destined for *Nassau*, but was either destined merely to call there or to be immediately transhipped after its arrival there without breaking bulk and without any previous incorporation into the common stock of that colony, and then to proceed to its real destination, being a blockaded port. The complicity of the owners of the ship, with the design of the owners of the cargo, is, to say the least, so probable on the evidence that there would be a great difficulty in contending that this ship and cargo had not been rightly condemned"—see *Moore's International Law Digest*, vol. 7, pp. 723-724.

And Lord Salisbury, in the controversy between Great Britain and Germany with respect to *THE BUNDESRATH* [1900] (*Pitt Cobbett's Leading Cases on International Law*, vol. ii. p. 473) and other vessels, adopted the judgment in *THE SPRINGBOK* (5 Wall. 1) (see *Parl. Papers*, 1900, Africa, No. 1); see also *Wheaton* (8th ed. by Dana), pp. 508 and 668, and an article in the *American Journal of International Law* (1915), vol. 9, p. 212, on "Contraband of War" (editorial comment).<sup>1</sup>

(1) In this article, after referring to the judgment of Chase, C.J., in *THE PETERHOFF* (5 Wall. 28), in which he divided merchandise into three classes, the authors say: "It is believed, however, that the time-honoured distinction drawn between the two classes [of absolute and conditional contraband] is more specious than real, for at the present

The American view is also well illustrated by the letter written by Mr. Bryan on January 20, 1915, when he was Secretary of State, to Mr. Stone, the chairman of the Foreign Relations Committee of the Senate, who had written to him setting out some twenty grounds of complaint on the part of Austro-German sympathisers against the United States. The letter expresses the official view, and is a State document.<sup>2</sup>

day articles useful to the army or navy may, if landed at an ordinary port, be easily and speedily transported by railroads to the army and navy. This was not the case when the distinction was pointed out by Grotius in his treatise on rights and duties in war and peace, published in 1625. It is, however, to-day a fact, and international law, to be adequate, must take note of facts. Again, in a war in which the nation is in arms, where every able-bodied man is under arms and is performing military duty, and where the non-combatant population is organised so as to support the soldiers in the field, it seems likely that belligerents will be inclined to consider destination to the enemy country as sufficient, even in the case of conditional contraband, especially if the government of the enemy possesses and exercises the right of confiscating or appropriating to naval or military uses the property of its citizens or subjects of service to the armies in the field."

The article sums up the various points as follows (p. 217): "It thus appears that by American practice, concurred in by Great Britain and affirmed by the awards of an arbitral tribunal, cargoes addressed to order or assigns in a neutral port may be condemned, and that cargoes addressed to a neutral port, intended to reach the enemy by internal communication, may likewise be condemned. The neutral, trading in contraband with a neutral port, runs the risk of losing the contraband cargo if, in the judgment of the captor, the circumstances surrounding the trade justify the belief that the articles of contraband are intended ultimately to find their way to the hands of the enemy, either by transshipment upon the seas or by internal communication."

(2) Mr. Bryan writes: "I have received your letter of the 8th instant, referring to frequent complaints or charges made in one form or another through the press that this Government has shown partiality to Great Britain, France, and Russia against Germany and Austria during the present war, and stating that you have received numerous letters to the same effect from sympathizers with the latter powers. You summarize the various grounds of these complaints and ask that you be furnished with whatever information the department may have touching these points of complaint, in order that you may be informed as to what the true situation is in regard to these matters. In order that you may have such information as the department has on the subjects referred to in your letter I will take them up seriatim. . . . (4) *Submission without protest to British violations of the rules regarding absolute and conditional contraband as laid down in the Hague Conventions, the Declaration of London, and international law.* There is no Hague Convention which deals with absolute or conditional contraband, and as the Declaration of London is not in force, the rules of international law only apply. As to the articles to be regarded as contraband, there is no general agreement between nations. It is the practice for a country, either in time of

[SIR SAMUEL EVANS (THE PRESIDENT).—Suppose the consignee or vendee in Denmark says, “I probably shall send these goods to Germany—I certainly shall if I can get the money for them, but I am not going to send them now, and I am not going to sell to A, B, or C. The goods are my own, and I will stock them for two or three months”?]

The test that Lord Stowell applied was, whether or not the goods were incorporated into the common stock of the country—see *THE MARIA* [1805] (5 C. Rob. 365, at p. 368; 1 Eng. P.C., at p. 496). But goods are not incorporated into the common stock of the country if, for example, A at Copenhagen buys a quantity of lard under a *bona fide* contract of purchase, but with the fixed intention of disposing of it three weeks afterwards to a purchaser for the German army. Each individual consignment must be judged on the merits of the evidence adduced as to the *bona fide* nature of the transaction:

peace or after the outbreak of war, to declare the articles which it will consider as absolute or conditional contraband. It is true that a neutral Government is seriously affected by this declaration, as the rights of its subjects or citizens may be impaired. But the rights and interests of belligerents and neutrals are opposed in respect to contraband articles and trade, and there is no tribunal to which questions of difference may be readily submitted.

“The record of the United States in the past is not free from criticism. When neutral this Government has stood for a restricted list of absolute and conditional contraband. As a belligerent, we have contended for a liberal list according to our conception of the necessities of the case.

“The United States has made earnest representations to Great Britain in regard to the seizure and detention by the British authorities of all American ships or cargoes *bona fide* destined to neutral ports, on the ground that such seizures and detentions were contrary to the existing rules of international law. It will be recalled, however, that American Courts have established various rules bearing on these matters. The rule of ‘continuous voyage’ has been not only asserted by American tribunals, but extended by them. They have exercised the right to determine from the circumstances whether the ostensible was the real destination. They have held that the shipment of articles of contraband to a neutral port ‘to order,’ from which, as a matter of fact, cargoes had been transhipped to the enemy, is corroborative evidence that the cargo is really destined to the enemy instead of to the neutral port of delivery. It is thus seen that some of the doctrines which appear to bear harshly upon neutrals at the present time are analogous to or outgrowths from policies adopted by the United States when it was a belligerent. The Government therefore cannot consistently protest against the application of rules which it has followed in the past, unless they have not been practised as heretofore. . . . (6) *Submission without protest to interference with American trade to neutral countries in conditional and absolute contraband.* The fact that the commerce of the United States is interrupted by

the size of the country, the nature of its internal economy, and the absence of local demand, may be factors in assisting to repel the assumption that goods of the character and quantity involved in these transactions are intended for local consumption; and where goods are consigned "to order" it is for the consignee to shew the innocence of the transaction.

With regard to the inference to be drawn—so far as the conditional contraband is concerned—that it was intended for the enemy Government, civil or military, or the enemy forces—that was its highly probable destination, and, on the assumption that the goods were intended *bona fide* for the German civilian population, there could not be any reason for concealment. All that the claimants had to do if the goods were conditional contraband was to tell the truth and place the facts on record, and they would have been safe. When it is admitted

Great Britain is consequent upon the superiority of her navy on the high seas. History shows that whenever a country has possessed that superiority our trade has been interrupted and that few articles essential to the prosecution of the war have been allowed to reach the enemy from this country. The department's recent note to the British Government, which has been made public, in regard to detentions and seizures of American vessels and cargoes is a complete answer to this complaint. Certain other complaints appear aimed at the loss of profit in trade which must include at least in part trade in contraband with Germany; while other complaints demand the prohibition of trade in contraband which appear to refer to trade with the allies. . (19) *Failure to protest against the modifications of the Declaration of London by the British Government.* The German Foreign Office presented to the diplomats in Berlin a memorandum dated October 10, calling attention to violations of and changes in the Declaration of London by the British Government and inquiring as to the attitude of the United States towards such action on the part of the allies. The substance of the memorandum was forthwith telegraphed to the department on October 22, and was replied to shortly thereafter to the effect that the United States had withdrawn its suggestion, made early in the war, that for the sake of uniformity the Declaration of London should be adopted as a temporary code of naval warfare during the present war, owing to the unwillingness of the belligerents to accept the Declaration without changes and modifications, and that thenceforth the United States would insist that the rights of the United States and its citizens should be governed by the existing rules of international law.

"As this Government is not now interested in the adoption of the Declaration of London by the belligerents, the modifications by the belligerents in that code of naval warfare are of no concern to it except as they adversely affect the rights of the United States and those of its citizens as defined by international law. In so far as those rights have been infringed the department has made every effort to obtain redress for the losses sustained."—*American Journal of International Law*, 1915, vol. 9, pp. 444-456.



that these goods in enormous quantities were going into Germany, when it is established that they were intended by the shippers to be forwarded into Germany, when they have resorted to every artifice to conceal their destination, the inference becomes irresistible that they knew the goods were intended for enemy consumption, and that they resorted to these various devices in order to deceive the belligerent.

Further, there is the direct inference to be drawn from the forms of certain of the packages, tins, and wrappings.

It is not essential for the Crown to give positive proof that the foodstuffs were intended for the enemy forces. Lord Stowell indicated the true view as to the onus in these cases in *THE JONGE MARGARETHA* [1799] (1 C. Rob. 189; 1 Eng. P.C. 100) when he said, "But the most important distinction is whether the articles were intended for the ordinary use of life . . . or whether they were going with a highly probable destination to military use." The Crown has proved a "highly probable military destination." It is in evidence that the chief trade between Copenhagen and Germany is carried on through Hamburg, Stettin, and Lübeck, which are German bases, and the onus cannot be on the Crown to shew, with reference to each parcel, that it was destined to one of those ports. Bacon, salt meat, and lard are all suitable for army use. The tinned beef resembles exactly that offered by Armours for the use of the British Army, and is packed in cases convenient for military use. Lard is an important part of German army rations, and both lard and fat backs are useful for making glycerine—out of 100 tons of lard ten tons of glycerine can be extracted, and out of 100 tons of fat backs eight tons of glycerine.

The Court should also take judicial notice of the general mobilisation, military and industrial, which has taken place in Germany, and of the many millions of the population thus involved. It is well known that the men mobilised for purely military purposes receive nominal payment only, and the necessary inference is that their dependants are rationed. All such persons must be regarded as having ceased to belong to the civilian population.

With regard to the invoicing of rubber as "gum," no case can be found where, with contraband on board coupled with false papers and description, both cargo and ship have not been condemned. "Carrying simulated papers is an efficient

cause of condemnation"—see *per* Lord Ellenborough in *OSWELL v. VIGNE* [1812] (15 East, 70); see also *CARRINGTON v. MERCHANTS INSURANCE CO.* [1834] (8 Peters, 495), where Story, J., in delivering the judgment of the Supreme Court of the United States, reviewed the English authorities at length—*THE BALTIC* [1809] (1 Acton, 25), and *THE RICHMOND* [1804] (5 C. Rob. 325). In *THE BERMUDA* (3 Wall. 514, at p. 556) Chase, C.J., dealing with the rule that a neutral ship was not forfeited for conveying contraband to a belligerent, said, quoting from Story, J., in *CARRINGTON v. MERCHANTS INSURANCE CO.* (8 Peters, 495), "The belligerent has a right to require a frank and *bona fide* conduct on the part of neutrals in the course of their commerce in times of war, and if the latter will make use of fraud and false papers to elude the just rights of belligerents and cloak their own illegal purposes, there is no injustice in applying to them the penalty of confiscation."

The Japanese applied the same doctrine in the Russo-Japanese War; see *THE BAWTRY* [1905] (2 Russ. and Jap. Cas. 265), where the conclusion of the Court is stated as follows: "The penalty for the carriage of contraband is limited in ordinary cases to the condemnation of the cargo, but when fraudulent devices are employed in order to evade capture by a belligerent the ship is condemned as well as the cargo." See also in the same volume the cases of *THE ROSELEY* (p. 228), *THE APHRODITE* (p. 240), *THE M.S. DOLLAR* (p. 284), *THE WYEFIELD* (p. 291), and *THE LYDIA* (p. 359). The old rule was that further proof was not allowed where there was an attempt to deceive the Court with false papers—see *THE IDA* [1854] (Spinks, 26; 2 Eng. P.C. 268), and *Phillimore's International Law*, vol. iii. p. 722.

*Cave, K.C.*, following.—The Order in Council of October 29, 1914, only repeals the Order in Council of August 20 as from October 29, and the same presumptions are applicable to vessels sailing between the two dates as if there had been no repeal. Alternatively, the Order of October 29 must apply to all the cases, because, if that Order repeals the earlier one, it is retrospective and applies to all the cases to which the earlier one would have applied. But it is submitted that the Court will apply to all vessels sailing in the interval between August and October the rules laid down in the Order in Council of August 20. The only

vessel to which the October Order in Council applies is the *Kim*, and the fact that the foodstuffs in the *Kim* were consigned "to order" is enough to condemn them—see heading 3 of the Order in Council. The French Prize Court has recently drawn an adverse inference with regard to such consignments in *THE INSULINDE* (March 18, 1915), where the Court inferred from the fact—amongst others—that a consignment of rubber bound to Amsterdam and Rotterdam was "to order," that the goods were liable to condemnation.

*Sir Robert Finlay, K.C.*, for Armour & Co. and various Danish consignees.—The Crown must satisfy the Court—first, that the foodstuffs were intended for the German Government or forces; secondly, that the transit to Germany to the point where they were to go to the Government or forces was planned from the first, and that the German destination was assigned to the goods by those who sent them from America. There is no ground for the alarming extension of the doctrine of continuous voyage indicated by counsel for the Crown—namely, that it applies even where the goods are sold at a neutral port and it rests with the neutral purchaser where to send them. The case of these claimants is not that their goods were intended for consumption in Denmark, but that the persons to whom they were consigned sold them to Germany: they were not consigned to the German forces, and there was no "continuous voyage," for the doctrine of continuous voyage is applicable only where the destination is that to which the original consignor destined the goods. It is universally admitted that foodstuffs are conditional contraband, although Ortolan in his *Diplomatie de la Mer*, vol. ii. pp. 191 and 216-220, expresses the view that they should only be so in very special circumstances, and Calvo in *Le Droit International*, s. 2741, says that they can be seized only if sent to a place which is being besieged or blockaded; but the argument of counsel for the Crown involves a great innovation upon the practice, and would have the effect of abolishing the distinction between absolute and conditional contraband altogether. The article read by the Solicitor-General as part of his argument suggests that a Prize Court might be ready to do this in a case where the whole nation is in arms and the facilities of transport are greater than in former times; and that provisions going to the enemy country may be treated as if they were destined for the enemy forces.

There is no authority for that extension, and it is contrary to every contention that has been put forward by this country, and every contention that is supported by British or American authorities—see *Hall* (6th ed.), pp. 657-658; *Wheaton* (8th ed. by Dana), pp. 620 *et seq.*; and *Phillimore* (3rd ed.), vol. iii. pp. 422-472.

There are only three instances in which provisions have been treated as absolute contraband. The first was by Great Britain in 1793 and 1795, when it was thought that France might be reduced by preventing the importation of foodstuffs; but the project failed, and the British doctrine ever since has been that provisions are conditional contraband only. The second instance is the case of France, when at war with China in 1885, declaring rice absolutely contraband, and the British Government protested—see *Parl. Papers*, France, No. 1 (1885) (C. 4359, Nos. 26 and 31). The third instance was in 1905, when the British Government again protested against the action of Russia during the hostilities between Russia and Japan.<sup>3</sup>

(3) On June 1, 1905, Lord Lansdowne wrote to Sir Charles Hardinge at St. Petersburg: "His Majesty's Government observe with great concern that rice and provisions will be treated as unconditionally contraband, a step which they regard as inconsistent with the law and practice of nations. His Majesty's Government do not contest that, in particular circumstances, provisions may acquire a contraband character, as, for instance, if they should be consigned direct to the army or fleet of a belligerent, or to a port where such fleet may be lying, and if facts should exist raising the presumption that they are about to be employed in victualling the fleet of the enemy. In such cases it is not denied that the other belligerent would be entitled to seize the provisions as contraband of war, on the ground that they would afford material assistance towards the carrying on of warlike operations. His Majesty's Government could not, however, admit that if such provisions were consigned to the port of a belligerent (even though it should be a port of naval equipment) they should therefore be necessarily regarded as contraband of war. In the view of His Majesty's Government the test appears to be whether there are circumstances relating to any particular cargo to show that it is destined for military or naval use. His Majesty's Government desire to point out that the decision of the Prize Court of the captor in such matters, in order to be binding on neutral States, must be in accordance with recognised rules and principles of international law. His Majesty's Government feel themselves bound to reserve their rights by protesting against the doctrine that it is for the belligerent to decide that certain articles, or classes of articles, are as a matter of course, and without reference to the considerations referred to in the earlier portion of this despatch, to be dealt with as contraband of war regardless of the well-established rights of neutrals; and His

Lord Stowell took great pains to shew in what circumstances provisions could be confiscated. The leading case is *THE JONGE MARGARETHA* (1 C. Rob. 189; 1 Eng. P.C. 100), in which a cargo of cheeses was condemned, but only because they were "such as are exclusively used in French ships of war," and were bound to Brest, a port of naval equipment. In the following year, in *THE NEPTUNUS* [1800] (3 C. Rob. 108; 1 Eng. P.C. 264), the Court refused to consider tallow as a naval store and liable to confiscation. "I am not disposed to consider it in that light on a destination to such a port as Amsterdam. Amsterdam is a great mercantile port, as well as a port of naval equipment"—see also *THE EDWARD* [1801] (4 C. Rob. 68; 1 Eng. P.C. 350), *THE TWENDE BRODRE* [1801] (4 C. Rob. 33; 1 Eng. P.C. 332), and *THE RANGER* [1805] (6 C. Rob. 125).

The same doctrines have been adopted in the American Courts. In *THE PETERHOFF* (5 Wall. 28, at p. 58) it is laid down that "merchandise of the second class [articles which may be used for purposes of war or peace, according to circumstances] is contraband only when actually destined to the military or naval use of a belligerent."

It is said that the German Government is in the habit of making requisitions on merchants for the supply of articles that would be useful for their troops, and therefore it follows that any articles of this kind that get to Germany may be taken by the German Government, and these goods are to be treated as contraband as being intended for the use of the enemy forces. Such a contention is not sustainable. The mere fact that they are destined for the enemy's country is for this purpose immaterial, and the fact that they may find their way to the forces of the enemy does not render the goods confiscable—see *THE VOLANT* [1866] (5 Wall. 179), where the goods consisted of uniform clothing; but it was held that condemnation was not justifiable, because it was not shewn that the goods were intended for the Confederate forces, although the uniform was similar—see also *THE SCIENCE* [1866] (5 Wall. 178), the early cases of *THE COMMERCE* (1 Wheaton, 382) and

Majesty's Government could not consider themselves bound to recognise as valid the decision of any Prize Court which violated those rights, or was otherwise not in conformity with the recognised principles of international law."—*Russia*, No. 1, 1905 [Cd 2344] No. 16.

MAISONNAIRE *v.* KEATING [1815] (2 Gall. 324), and the recent case of *THE BENITO ESTENGER* [1900] (176 U.S. 568).

The test of a continuous voyage is whether the whole transportation is made in pursuance of a single mercantile transaction preconceived by the consignor from the outset. The doctrine has never been applied to a case where the goods, on arrival at the neutral port, are sold there, and the buyer may send them to an enemy country or any other country at his choice. Sir Edward Grey, in the instructions sent to Sir C. MacDonald for the purpose of the International Naval Conference held in London in 1909, puts the proposition very clearly: "(1) When an adventure includes the carriage of goods to a neutral port, and thence to an ulterior destination, the doctrine of 'continuous voyage' consists in treating for certain purposes the whole journey as one transportation, with the consequences which would have attached had there been no interposition of the neutral port. (2) The doctrine is only applicable when the whole transportation is made in pursuance of a single mercantile transaction preconceived from the outset. Thus it will not be applied where the evidence goes no further than to show that the goods were sent to the neutral port in the hopes of finding a market there for delivery elsewhere"—*Miscellaneous*, No. 4 (1909) [Cd 4554], pp. 7 and 8.

The whole doctrine is also clearly expressed in *THE STEPHEN HART* (Blatch. Pr. Cas. 387), and its limits are well laid down in *THE BERMUDA* (3 Wall., at p. 551). In *THE SPRINGBOK* (5 Wall. 1, at pp. 25, 26) Chase, C.J., says, "If the real intention of the owners was that the cargo should be landed at Nassau and incorporated by real sale into the common stock of the island, it must be restored . . . had such sale been intended it is most likely that the goods would have been consigned to some established house in the bills of lading." In the case of *Armour & Co.*, the *Provision Import Co.*, and others, the consignments were to persons at Copenhagen. For example, in the case of *Armours* the bills of lading were drawn to the order of *Armour & Co.*, of Copenhagen, a distinct firm incorporated as a company.

In *THE PETERHOFF* (5 Wall. 28, at pp. 56, 57), after referring to *THE JONGE PIETER* (4 C. Rob. 79; 1 Eng. P.C. 353) and other cases, the Court says: "These cases fully recognise the lawfulness of neutral trade to or from a blockaded country by inland

navigation or transportation. . . . Trade with a neutral port in immediate proximity to the territory of one belligerent is certainly very inconvenient to the other. Such trade, with unrestricted inland commerce between such a port and the enemy's country, impairs undoubtedly and very seriously impairs the value of a blockade of the enemy's coast. But in cases such as that now in judgment, we administer the public law of nations, and are not at liberty to inquire what is for the particular advantage or disadvantage of our own or another country."

The Declaration of London, not having been ratified, can only apply so far as it derives validity from Orders in Council; and the question arises whether it is competent to the Crown, by Order in Council, to alter international law in a matter affecting neutrals, and whether effect should be given to such alteration by the Prize Court. *THE ZAMORA* (*ante*, p. 309), in which the matter was discussed, rests on a footing of its own, the decision being based on the view that the particular Order in Council did not alter the law of nations.

The question is elaborately discussed by Lord Stowell in *THE MARIA* [1799] (1 C. Rob. 340; 1 Eng. P.C. 152), *THE FOX* [1811] (Edw. 311; 2 Eng. P.C. 61), and *THE RECOVERY* [1807] (6 C. Rob. 341); see also *Phillimore's International Law*, vol. iii. pp. 651-657. In the particular circumstances Lord Stowell thought that the Orders in Council directing reprisals which affected neutrals did not infringe international law. Sir Robert Phillimore takes a different view, but the decisions shew that Lord Stowell exercised his own right of judgment as to whether the reprisals were in conformity with international law. The statement of Story, J., in *MAISONNAIRE v. KEATING* (2 Gall. 325, at p. 334), that "if . . . the Sovereign should, by a special order, authorise the capture of neutral property for a cause manifestly unfounded in the law of nations, there can be no doubt that it would afford a complete justification of the captors in all tribunals of Prize," only refers to a particular capture directed by the orders of the sovereign. Admittedly, if a special order is made that certain cargoes be confiscated as acts of the Government, the only redress is by diplomatic means or, as a last remedy, by resort to arms. That does not answer the question whether a particular Order, with regard to which international law is to be applied, is or is not in conformity with recognised international law. If the passage has any

wider meaning, it is not in conformity with the doctrines laid down by Lord Stowell, and afterwards applied by Sir James Mackintosh, Recorder of Bombay, in the case of *THE MINERVA*, in which he thought that certain Orders were not in conformity with international law—see *Life of the Rt. Hon. Sir James Mackintosh*, vol. i. pp. 317-19.

Writers on jurisprudence, when they refer to the Sovereign power of the country, commonly refer to the power vested in the Legislature as well as in the executive. If Story, J.'s remarks have application to a case where Parliament had authorised, or where, in the United States, a law had been passed directing a particular course of action to be followed, they are accurate, and it may be that this is the explanation of the passage which otherwise would be in conflict with principle.

Article 35 of the Declaration of London introduced a new principle by abolishing the doctrine of continuous voyage as applied to conditional contraband. The Orders in Council modify the effect of article 36 and revise the doctrine. They are therefore not binding on the Prize Court, and should be disregarded.

But, even if valid, the Crown cannot rely on the Order of August 20, because the Order of October 29 repealed it, and there is no authority for the proposition that it continues in force as regards vessels which sailed between the dates of the two Orders. In Acts of Parliament repealing other enactments it has constantly been the practice to introduce a clause providing that the repeal shall not affect anything which has already been done, and these enactments were given effect to by a general provision in section 38 of the Interpretation Act, 1889, which applies to all statutes passed after 1889 to that effect. But there is no similar provision with regard to Orders in Council, and according to the argument for the Crown, all the provisions in Acts of Parliament, that the repeal of a statute should not affect anything already done, were unnecessary, and therefore it was unnecessary to introduce the general provision in the Act of 1889. The Order of October 29, when it repeals the Order of August 20, meant that the adoption of the Declaration of London, subject to the modifications made by the Order of August 20, was considered to be inexpedient, and therefore the Order is repealed with no saving clause.

[*Cave, K.C.*—There are several authorities on the effect of a repeal. There is *BUTCHER v. HENDERSON* [1868] (37 L. J.



Q.B. 133; L. R. 3 Q.B. 335), where Blackburn, J. said, "The maxim alike of law and justice is, '*Nova constitutio futuris formam imponere debet, non præteritis*,' and therefore, though when a statute is repealed, it is as to new matters as though it had never existed, yet as to transactions already completed under it, it still has full effect."]

Yes, as to transactions completed. Lord Tenterden gave judgment to the same effect in *SURTEES v. ELLISON* [1829] (9 B. & C. 750), and these cases would have applied if the ships had been brought in and condemned before the repeal. The exception has nothing to do with a ship which has merely sailed.

And, even assuming that the Order of August 20 is effective, the goods are not "consigned to an agent of the enemy State" or "to or for a merchant or other person under the control of the authorities of the enemy State." Further, article 5 of the Order in Council, which provides that, "notwithstanding the provisions of article 35 of the Declaration, conditional contraband, if shown to have the destination referred to in article 33 [enemy armed forces or Government], is liable to capture to whatever port the vessel is bound and at whatever port the cargo is to be discharged," is not satisfied. This Order, therefore, even if in force, would not help the case for the Crown.

With regard to the Order of October 29—assuming it to be in force—heading 3 provides that, "notwithstanding the provision of article 35 of the Declaration, conditional contraband shall be liable to capture on board a vessel bound for a neutral port if the goods are consigned 'to order.'" These words mean "to the order of the consignor." The Order cannot apply to the case of goods consigned to the consignee or his order. A bill of lading is not negotiable if the words "to order" are omitted—*HENDERSON & Co. v. COMPTOIR D'ESCOMPTE DE PARIS* [1873] (42 L. J. P.C. 60; L. R. 5 P.C. 253). The motive underlying the provision in the Order is that if the bills of lading are in blank the goods may go anywhere—to any person to whom the duplicate copies have been sent—which cannot happen if the goods are consigned to a specific person or his order.

To succeed in these cases the Crown has the burden of proving that the goods were contraband and liable to confiscation, and the attempt to make out the two things necessary—namely, that the goods were destined to the German forces

or Government, and that they were to go to that destination by continuous voyage within the meaning of the cases which have been referred to—has totally failed. The goods, therefore, should be restored to the various claimants with adequate compensation for the losses they have sustained by reason of the seizure.

*Leslie Scott, K.C.*, following, and also for *Morris & Co.* and *Stern & Co.*—The cases of *HOBBS v. HENNING* [1865] (34 L. J. C.P. 117) and *SEYMOUR v. LONDON AND PROVINCIAL INSURANCE Co.* [1872] (41 L. J. C.P. 193) shew that to render contraband liable to condemnation it must be proved that the destination is a guilty destination. The principle underlying the rule of international law, that contraband is liable to condemnation, is that the neutral shipper of contraband, in his private capacity, is guilty of an unneutral act towards the belligerent; and these two cases draw a clear distinction, on the question of continuous voyage, between a shipment to a neutral port for the purpose of the goods ultimately finding their way to a contraband destination, and a shipment which is continuous to that destination in the sense that the shipper is a party to the transport to the ultimate destination. See also *THE IMINA* [1800] (3 C. Rob. 167; 1 Eng. P.C. 289) and *PELLECAT v. ANGELL* [1835] (4 L. J. Ex. 326; 2 C. M. & R. 311). Applying that principle to the facts of the present case, where goods are merely going to the neutral port because they will find a ready sale there, it is immaterial whether it be direct to German buyers or to dealers who will send the goods on to Germany, because, for the purpose of conditional contraband, the continuity of the voyage to the enemy Government or forces must be established, and it does not matter at what point short of that ultimate destination the voyage is terminated, whether it be in Denmark or in Germany, if it is terminated at any point short of that destination.

*Dawson Miller, K.C.*, for *J. Ullmann & Co.*, in respect of rubber on board the *Fridland*.—The Order in Council of August 20 can in no way impair the doctrine that, in order to prove hostile destination (bearing in mind the distinction between absolute and conditional contraband), it must be shewn that the hostile destination was the result of one mercantile transaction preconceived from the outset. The mere fact that the rubber was called gum is not sufficient to raise any presumption of

a consignment to enemy forces or a Government department of the enemy. The argument of the Attorney-General amounts to this—that once it appears that there are “false papers,” although these are not false papers at all—condemnation follows *ipso facto*. None of the cases which have been referred to supports that proposition. Most of them were decisions upon the question of how far a vessel herself was implicated by false papers, where there had been either a carriage of contraband or a breach of blockade. False papers in themselves do not work a forfeiture. However guilty the intention may be—assuming that the rubber was falsely described in order to avoid capture—the consignors or shipowners, being, under the mistaken impression that conditional contraband bound to Denmark was liable to capture—if, in fact, it turns out that the destination is innocent, then, whatever their intentions may have been, the cargo cannot be condemned—see *THE TRENDE SOSTRE* [1807] (6 C. Rob. 391*n.*; 1 Eng. P.C. 588), *THE LISETTE* [1806] (6 C. Rob. 387; 1 Eng. P.C. 587), and *THE MADONNA DEL BURSO* [1802] (4 C. Rob. 169; 1 Eng. P.C. 370).

On October 22 the export of rubber from Denmark was prohibited, and the *Fridland* did not sail from New York until the 28th. It is inconceivable, therefore, if the intention was to have this consignment transhipped to a hostile destination, that it was not put on a vessel bound to Sweden, where at that time there was no prohibition against the exportation of rubber. But the description of rubber as “gum” was not a false description. It is admitted that there is no evidence that gum is used to designate rubber bound to Great Britain, but it is a word in common use in America, and at most it was an unusual, though a perfectly legitimate, description. It may be that after argument a Court might decide otherwise on the ground that it was more in consonance with commercial usage to call it rubber. But that does not make it a fraud, and only means that the shippers were wrong in assuming that they were within their rights in calling it gum.

[SIR SAMUEL EVANS (THE PRESIDENT).—In *THE CAROLINA* [1800] (3 C. Rob. 75) the cargo, the destination of which was wrongly stated in the ship’s papers, was condemned.]

Destination goes to the root of the matter. If the destination is wrongly stated, the inference, if the cargo be of a contraband nature, is that it is going to an enemy port. This alleged

misdescription does not prove enemy destination at all. The charterers, and not the consignees, are responsible for the description, and putting the most adverse construction upon it it was merely a device to get the rubber through unmolested—not to an enemy port—but to its real destination, Copenhagen.

[Reference was also made to *THE MARGARETHA CHARLOTTE* [1801] (3 C. Rob. 78*n.*), *THE EBENEZER* [1806] (6 C. Rob. 250), *THE SARAH CHRISTINA* [1799] (1 C. Rob. 237; 1 Eng. P.C. 125), and *THE PHOENIX* [1800] (3 C. Rob. 186).]

Counsel for the various other claimants dealt with the facts of their respective cases, and adopted, in the main, the arguments already set out.

*The Solicitor-General* (Sir F. E. Smith, K.C.), in reply.—The evidence establishes that, with the outbreak of war, an enormous increase took place in the export of foodstuffs from the United States to Scandinavian ports, and the case now made by the American shippers, that the cargoes were intended for the civilian population of Germany, cannot be accepted, for it is inconsistent—firstly, with the case put forward originally that the shipments were intended for Scandinavian consumption; secondly, with the devices adopted to create the impression that agents with German connections were *bona fide* neutral consignees; thirdly, with the failure of the claimants to produce the contracts, instructions, &c., for the carrying out of the contracts to the civilian population; and fourthly, with the private correspondence of the parties as revealed in the intercepted documents.

With regard to the bills of lading, they do not shew the real destination, and to that extent they are false. They were nearly all “to order,” and therefore did not shew the real consignees. They ought to have been “through” bills of lading to the order of the German merchants at the port to which the goods were ultimately destined. In *THE GRAAF BERNSTORF* [1800] (3 C. Rob. 109; 1 Eng. P.C. 265) the Court said, “The question will distinctly arise, whether a person having sent out contraband articles under a false destination can be admitted to stand up in a Court of a belligerent and claim a cargo arising out of the proceeds of that contraband.”

The case, as a whole, is covered by the observation of Lord Stowell in *THE SARAH CHRISTINA* (1 C. Rob. 237; 1 Eng. P.C. 125), that there has been “a total absence of that fair

conduct which ought to have been maintained in order to entitle the cargo to the benefit of the more favourable rule"; and it is submitted that the claimants' bad faith is fatal to their claims—see *THE EENROM* [1799] (2 C. Rob. 1, at p. 9; 1 Eng. P.C. 168, at p. 174), where Sir W. Scott said: "The regular penalty of such a proceeding must be confiscation; for it is a rule of this Court, which I shall ever hold till I am better instructed by the Superior Court, that if a neutral will weave a web of fraud of this sort, this Court will not take the trouble of picking out the threads for him, in order to distinguish the sound from the unsound; if he is detected in fraud he will be involved *in toto*. A neutral surely cannot be permitted to say, 'I have endeavoured to protect the whole but this part is *really* my property; take the rest, and let me go with my own.' If he will engage in fraudulent concerns with other persons, they must all stand or fall together." See also *THE CALYPSO* [1799] (2 C. Rob. 154), *THE ROSALIE AND BETTY* [1800] (2 C. Rob. 343; 1 Eng. P.C. 246), and *THE NEPTUNUS* [1800] (3 C. Rob. 80).

With regard to the rubber claims, a misleading description of the cargo was adopted in order to deceive the captor. The fact that certain persons in other connections call rubber "gum" is only relevant if there be no intention to deceive. If there were such an intention, the trick adopted is aggravated because it is more subtle, and it is obvious that the reason that the rubber was described as gum was that rubber was well known to be objectionable, and gum was known to be innocent.

The claimants' arguments are based on the proposition, first, that a sale by neutrals to neutrals in neutral territory is permissible, even though the vendor knows that the buyer will sell to the enemy; and secondly, that a sale by a neutral to the enemy on neutral territory is equally permissible. But only about one-fifth of the goods shipped on these ships even purport to have been already sold; the balance was sent on consignment by the packers to their agents, many of whom had come from Hamburg to see that the goods were sent through to Hamburg without delay, and counsel for the various claimants have entirely failed to meet the point that, in the majority of the cases, there was no question of sale.

The Crown has proved enough to make it necessary for the claimants to shew by affirmative evidence—which they alone can give—that the case now put forward, that the goods were sold in Copenhagen to German merchants for the civilian population, is a true one. The argument of Sir Robert Finlay, that it is necessary for the Crown to prove affirmatively that the goods were intended for the German Government or forces as a transit planned from the outset by the American consignors, involves too wide a proposition, and puts too great an onus on the Crown. It is impossible for the Crown to shew that the persons who sent the goods into Germany were German Government agents, because the evidence establishes that it is not the practice of Germany to buy openly by agents. In war time the Government encourages imports by abolishing the tariffs, and when the goods have been brought in exercise the power of requisition.

When the neutral is prepared to cloak the transactions by the use of bills of lading made out to order at an intervening port, it is impossible for the Crown to discharge the onus which the claimants seek to impose upon them. All that the Crown must do is to satisfy the Court that there was "a highly probable military destination," and this has been done. This rule has been universally applied by belligerents in recent wars. By article 14 of the Japanese Regulations provisions will be held to be contraband of war "when they are destined for the enemy army or navy, or when they may from the circumstances of their place of destination be regarded as intended for the use of the army or navy on reaching enemy territory"—*Russian and Japanese Prize Cases*, vol. ii. p. 424.

It is useful to see how the enemy draw inferences that goods are destined to a military base. In the case of *THE MARIA* [1915] (*Hanseatische Gerichtszeitung*, April 17; translated in *Lloyd's List*, July 1), a Dutch ship, captured on September 21, 1914, on a voyage to Belfast with a cargo of wheat, and brought before the Prize Court at Hamburg, it was argued on behalf of the shipowners and cargo owners that the cargo was exclusively destined for the private use of the purchaser, and was to be sold to private persons and not to the British army, and the claimants produced a number of documents to substantiate their statements; but the Court drew an irrebuttable inference that Belfast was one of the "fortified places and the places used

by the English fighting forces as a base for military operation and supplies."

[SIR SAMUEL EVANS (THE PRESIDENT).—I think by the latest Ordinance of the German Empire the presumed enemy destination is a very wide one. "Enemy destination of conditional contraband is presumed (1) if the same is consigned to an Administrative Organ of the enemy State or to an agent of such authority, or to a merchant regarding whom it has been established that he supplies articles of the kind in question or products made from the same to the Armed Forces or the Administrative Organ of the enemy; or (2) where the consignment is to order or to a consignee not named in the papers, or to a person residing in enemy territory or territory occupied by the enemy; or (3) if the consignment is destined for a fortified place of the enemy or to a place used as a base for military operations or supplies." The widest there, of course, is a consignment to a person residing in enemy territory or territory occupied by the enemy. That is from the Ordinance of April 18, 1915, so far as I have been able to ascertain it.]

With regard to the argument that the Prize Court cannot act on Orders in Council, which, it is suggested, are in conflict with the law of nations, it is submitted that in case of any alleged contradiction between an Order in Council and an alleged rule of international law, there is a presumption in favour of the legality of the Order in Council. That doctrine is borne out by the case of *THE FOX* (Edw. 311; 2 Eng. P.C. 61). If it could be shewn that there was a clear contradiction between an Order in Council and a rule of international law, it would be the duty of the Prize Court to enforce the Order in Council as emanating from the authority from which it derives its powers—see *MAISONNAIRE v. KEATING* (2 Gall. 325). But the rules made by the two Orders in Council are not in violation of international law. The doctrine of continuous voyage is accepted by the claimants, and recognised by the international jurists of England and America.

Assuming the claimants' argument to be good, that the Order in Council of August 20 is entirely nullified by the Order in Council of October 29, then either the law in force before the August Order in Council must be operative, so that the doctrine of continuous voyage with the American extension of that doctrine apply, or the October Order in Council must apply.

In conclusion, the goods of the Chicago packers, consigned by them or their agents, are subject to condemnation on the grounds, first, that there is sufficient evidence of enemy military or Government destination; secondly, that the fraud which these claimants have practised carries condemnation; and thirdly, that the fraud shifts the onus, and the claimants have not proved an innocent destination. Goods which are consigned to named consignees other than agents are subject to condemnation on the grounds: First, that the claimants have not produced proper evidence that the property in the goods had passed to them, and that, if not, these goods are involved in the condemnation of the other property of the packers—see article 42 of the Declaration of London; and secondly, that the claimants are involved in the general fraud organised by the packers. Belligerents cannot be expected to sort the good claims from the bad, especially when unassisted in the matter of documents. Alternatively, if any of the goods are entitled to be released, there should be no compensation, as there was reasonable cause for capture.

The conditionally contraband rubber is subject to condemnation on the grounds: First, that there is sufficient evidence of enemy military or Government destination; secondly, that the misdescription involves condemnation *per se*; and thirdly, that the fraud shifts the onus, and the claimants have not proved an innocent destination. The absolute contraband should be condemned on the same grounds, but as there is sufficient evidence of destination to an enemy country no more need be proved.

*Cur. adv. vult.*

Sept. 16.—SIR SAMUEL EVANS (THE PRESIDENT).—The cargoes which have been seized, and which are claimed in these proceedings, were laden on four steamships belonging to neutral owners, and which were under time charters to an American corporation, the Gans Steamship Line. John H. Gans, the president of the company, is a German. He has resided in America for some years, but he has not been naturalised. The general agent of the company in Europe was one Wolenburg, of Hamburg.

The four ships were the *Alfred Nobel*, the *Bjornstjerne Bjornson*, the *Fridland*, and the *Kim*. They all started within



a period of three weeks in October and November last on voyages from New York to Copenhagen with very large cargoes of lard, hog and meat products, oil stocks, wheat, and other foodstuffs; two of them had cargoes of rubber and one of hides. They were captured on the voyage, and their cargoes were seized on the ground that they were conditional contraband alleged to be confiscable in the circumstances, with the exception of one cargo of rubber, which was seized as absolute contraband.

The Court is now asked to deal only with the cargoes. All questions relating to the capture and confiscability of the ships are left over to be argued and dealt with hereafter.

It is necessary to note the various dates of sailing and capture. They are as follows:

	Date of Sailing.	Date of Capture.
<i>Alfred Nobel</i> . . . .	Oct. 20, 1914.	Nov. 5, 1914.
<i>Bjornstjerne Bjornson</i> . . . .	„ 27 „	„ 11 „
<i>Fridland</i> . . . . .	„ 28 „	„ 10 „
<i>Kim</i> . . . . .	Nov. 11 „	„ 28 „

Upon some of these dates may depend questions touching what Orders in Council are applicable. One Order in Council, adopting with modifications the provisions of the Convention known as the "Declaration of London," was promulgated on August 20, 1914, and another on October 29, 1914. Proclamations as to contraband, absolute and conditional, were issued on August 4, September 21, and October 29, 1914.

It is useful to note here, in order to avoid any possible misconception or confusion, that the later Order in Council of March 11, 1915 (sometimes called the Reprisals Order), does not affect the present cases in any way.

Before proceeding to state the result of the examination of the facts relative to the respective cargoes and claims, a general review may be made of the situation which led up to the dispatch of the four ships with their cargoes to a Danish port.

Notwithstanding the state of war, there was no difficulty in the way of neutral ships trading to German ports in the North Sea other than the perils which Germany herself had created by the indiscriminate laying and scattering of mines of all description, unanchored and floating outside territorial waters in the open sea in the way of the routes of maritime trade, in defiance of international law and the rules of conduct of naval warfare,

and in flagrant violation of the Hague Convention, to which Germany was a party. Apart from these dangers, neutral vessels could have, in exercise of their international right, voyaged with their goods to and from Hamburg, Bremen, Emden, and any other ports of the German Empire. There was no blockade involving risk of confiscation of vessels running or attempting to run it. Neutral vessels might have carried conditional and absolute contraband into those ports, acting within their rights under international law, subject only to the risk of capture by vigilant warships of this country and its allies.

But the trade of neutrals—other than the Scandinavian countries and Holland—with German ports in the North Sea, having been rendered so difficult as to become to all intents impossible, it is not surprising that a great part of it should be deflected to Scandinavian ports, from which access to the German ports in the Baltic and to inland Germany by overland routes was available, and that this deflection resulted, the facts universally known strongly testify. The neutral trade concerned in the present cases is that of the United States of America, and the transactions which have to be scrutinised arose from a trading, either real and *bona fide*, or pretended and ostensible only, with Denmark, in the course of which these vessels' sea voyages were made between New York and Copenhagen.

Denmark is a country with a small population of less than three millions, and is, of course, as regards foodstuffs, an exporting, and not an importing, country. Its situation, however, renders it convenient to transport goods from its territory to German ports and places like Hamburg, Altona, Lübeck, Stettin, and Berlin.

The total cargoes in the four captured ships bound for Copenhagen within about three weeks amounted to about 73,237,000 lb. in weight. (These weights and other weights which will be given are gross weights according to the ships' manifest.) Portions of these cargoes have been released, and other portions remain unclaimed. The quantity of goods claimed in these proceedings is very large. Altogether the claims cover about 32,312,000 lb. (exclusive of the rubber and hides).

The claimants did not supply any information as to the quantities of similar products which they had supplied or consigned to Denmark previous to the war.

Some illustrative statistics were given by the Crown with regard to lard of various qualities, which are not without significance, and which form a fair criterion of the imports of these and like substances into Denmark before the war; and they give a measure for comparison with the imports of lard consigned to Copenhagen after the outbreak of war upon the four vessels now before the Court. The average annual quantity of lard imported into Denmark during the three years 1911 to 1913 from all sources was 1,459,000 lb. The quantity of lard consigned to Copenhagen on these four ships alone was 19,252,000 lb. Comparing these quantities, the result is that these vessels were carrying towards Copenhagen within less than a month more than thirteen times the quantity of lard which had been imported annually to Denmark for each of the three years before the war.

To illustrate further the change effected by the war, it was given in evidence that the imports of lard from the United States of America to Scandinavia (or, more accurately, to parts of Europe other than the United Kingdom, France, Belgium, Germany, the Netherlands, and Italy) during the months of October and November, 1914, amounted to 50,647,849 lb. as compared with 854,856 lb. for the same months in 1913—showing an increase for the two months of 49,792,993 lb.; or, in other words, the imports during those two months in 1914 were nearly sixty times those for the corresponding months of 1913.

One more illustration may be given from statistics which were given in evidence for the claimants Hammond & Co. and Swift & Co.: In the five months, August-December, 1913, the exports of lard from the United States of America to Germany were 68,664,975 lb. During the same five months in 1914 they had fallen to a mere nominal quantity—23,800 lb. On the other hand, during those periods similar exports from the United States of America to Scandinavian countries (including Malta and Gibraltar, which would not materially affect the comparison) rose from 2,125,579 lb. to 59,694,447 lb.

These facts give practical certainty to the inference that an overwhelming portion (so overwhelming as to amount to almost the whole) of the consignments of lard in the four vessels we are dealing with was intended for, or would find its way into, Germany. These, however, are general considerations, important to bear in mind in their appropriate place, but not

in any sense conclusive upon the serious questions of consecutive voyages, of hostile quality, and of hostile destination, which are involved before it can be determined whether the goods seized are confiscable as prize.

The dates of sailing and capture have been given with an intimation that they may have a bearing upon the law applicable to the cases. The *Alfred Nobel*, the *Bjornstjerne Bjornson*, and the *Fridland* started on their voyages in the interval between the making of the two Orders in Council of August 20 and October 29. The *Kim* commenced her voyage after the latter Order came into force.

By the Proclamation of August 4 all the goods now claimed (other than the rubber and the hides) were declared to be conditional contraband.

The cargoes of rubber seized were laden on the *Fridland* and the *Kim*. Rubber was declared conditional contraband on September 21, 1914, and absolute contraband on October 29. Accordingly, the rubber on the *Fridland* was conditional contraband, and that on the *Kim* was absolute contraband.

The hides were laden on the *Kim*. Hides were declared conditional contraband on September 21, 1914.

No contention was made on behalf of the claimants that the goods were not to be regarded as conditional or absolute contraband, in accordance with the respective proclamations affecting them. That is to say, it was admitted that the goods partook of the character of conditional or absolute contraband under the said proclamations, and were to be dealt with accordingly.

The law can best be discussed, and can only be applied, after ascertaining the facts.

The details relating to the ships and their cargoes, which it has been necessary to examine, are very voluminous. I must try to summarise them for the purposes of this judgment, in order to make it intelligible in principle and in the results. To attempt to give even a moderate proportion of the details would tend to bewildering confusion.

The number of separate bills of lading covering the cargoes on the four vessels is about 625. Four large American firms were consignors of goods on each of the four vessels, and a fifth on two of them. According to the figures given to the Court by the Law Officers of the Crown, those five American

firms were consignors of lard and meat products to the following extent :

	lb.
Armour & Co. . . . .	9,677,978
Morris & Co. (with Stern & Co.) . .	6,868,213
Hammond & Co. (with Swift & Co.) .	3,397,005
Sulzberger & Sons Co. . . . .	2,602,009
Cudahy & Co. . . . .	729,379

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This makes up a total of . . . 23,274,584

These figures I accept as substantially correct. The other figures in my judgment I am responsible for.

Those portions of the cargoes which have been released, and those which have not been claimed, will be dealt with in a separate judgment. There is some overlapping, as some parts of the cargoes have been claimed by the consignors, and also by some alleged vendees. For these and other reasons some corrections in the figures which follow may become necessary, but they are substantially correct as they stand in the various documents and as they were dealt with at the hearing, and certainly sufficiently accurate for the purpose of determining all questions relating to the rights of the Crown to condemnation or of the various claimants to release. [His Lordship analysed the claims as set out above (*ante*, pp. 407-411), and continued :] The first steamship which sailed was the *Alfred Nobel*. The chief shippers on this vessel were Morris & Co. and Armour & Co. The direct claim of these two companies in respect of goods laden by them on this vessel are: Morris & Co., 1,574,091 lb., and Armour & Co. 1,537,913 lb.

It will be convenient to investigate the cases of these shippers first in this order, both as regards the *Alfred Nobel* and the other three steamers, upon all of which these two companies were heavy consignors.

#### MORRIS & Co.

This meat-packing company, of Chicago and New York, at the beginning of the war had a large business with Germany, which they carried on at the Europe end, at Hamburg. They had in their employ at Hamburg two persons, named McCann and Fry. Fry was their manager. They appear to have had an agent also at Copenhagen of the name of Conrad Bank. The transactions relating to their shipments of between six and

a half and seven million lb. of products on the four vessels were carried through by McCann and Fry, and not by Bang. Not long after the war began McCann and Fry left Hamburg, and took up their quarters at Copenhagen.

McCann was named in hundreds of the bills of lading in which Morris & Co. were the shippers as the "party to be notified." He was so named in all, with a few exceptions which are insignificant. He had no business at Copenhagen or in Denmark before the war. He had apparently no office in Copenhagen. His address was "The Bristol Hotel." The instructions to him from Morris & Co. as to the change from Hamburg to Copenhagen, and as to the initiation and progress of the business transactions carried on either at or through Copenhagen, must have been in writing unless he visited America or some one from America visited him. No such instructions were produced in evidence, and no explanation was given of them. Not a single letter passing between Morris & Co. and McCann or Fry was produced. A few telegrams were in evidence, but that was due to their having been intercepted by the British Censor, and they were put before the Court by the Procurator-General. McCann did not even make an affidavit in explanation of his own part of the transactions. Nor did Fry. Affidavits from them, if they comprised a complete and truthful statement of the facts within their knowledge, would have been of value and assistance to the Court.

On November 28 McCann and Fry together formed a company in Copenhagen, under the name of the "Dansk Fedt Import Kompagnie." Its capital was only about 120*l.* (2,000 kronen), but it imported lard and meat by the end of the year—that is, in about five weeks—to the value of about 280,000*l.* (5,000,000 kronen). Later on McCann is cabling from Copenhagen to Morris & Co. in New York, "Don't ship any lard Copenhagen, export prohibited." Afterwards, goods like lard and fat backs were consigned by Morris & Co. to Genoa—Italy had not then joined in the war.

The evidence put forward in support of the direct claim of Morris & Co. was an affidavit of Mr. Harry A. Timmins, which was sworn in Chicago on May 27, 1915. Mr. Timmins is the assistant secretary and treasurer of the company. The case which he there makes is that the goods had been sent to

Copenhagen in the ordinary course of the business of the company in Denmark itself.

It is advisable to set out the main paragraphs verbatim :

"2. The claimant (Morris & Co.) has for many years shipped considerable quantities of its products to Denmark, both directly to Copenhagen and through adjacent branch houses. The sale of such products for several years was made either through Morris Packing Company, a corporation of Norway, or an individual salaried employee of the claimant. Said Morris Packing Company or said salaried individual employee of claimant always had strict instructions from the claimant to confine sales to Denmark, Scandinavian countries, and Russia, and not to sell to any other countries, owing to the fact that the claimant has agents in other countries, and it is essential that said agent's operations be strictly confined to his own district."

"4. In the month of October 1914 the claimant shipped on board the Norwegian Steamship *Alfred Nobel* [the paragraphs in the affidavits relating to the other three steamships are identical] the goods particulars of which are set out in the schedule to this affidavit. The whole of said goods was shipped 'to order' Morris & Company, notify claimant's agent in Copenhagen (said agent being a native born citizen of the United States of America) for sale on consignment in the agent's own district in the ordinary course of business. The standing instructions to the agent that no sales were to be made outside the agent's district were never withdrawn by the claimant."

The deponent refrains from giving any particulars or even summaries of the "considerable" quantities of the company's products shipped to Copenhagen or Denmark for the years before the war; he does not even say what the "products" shipped were; but the impression clearly intended to be produced was that the goods on the four ships in question were sent in the Denmark business, and were not to be sold by the "salaried employee" or "agent" in other countries "outside the agent's district." There is no reference to any German market to be supplied from Denmark. Germany is not even mentioned. The "agent" in Copenhagen is carefully described as "a native born citizen of the United States of America," but otherwise he is left shrouded in anonymity. Mr. McCann was his name. His collaborator, Fry, is not

mentioned. Nor is the company (the Dansk Fedt Kompagnie), which they formed in November, 1914, disclosed. For aught the affidavit says or suggests, the business attentions of Mr. McCann might have been confined for many years before the war to the comparatively humble and quiet Danish or Scandinavian district of the claimant's business. His and Fry's real business activity up to October, 1914 (we now know), was in the great centre of Hamburg.

The solicitors for the claimants had been instructed soon after the seizure to put forward the same kind of case, although more limited, because the authority was then said to be to sell only in Denmark to the exclusion of the rest of Scandinavia and Russia, for, in a letter to the Procurator-General in December, 1914, they wrote: "The duty of the consignors' representative in Copenhagen was to sell only for delivery in Copenhagen against cash (except as to 800 tierces of lard shown in the table set out in our letter to you of the 11th inst. which were going to Christiania) and it was never the intention of the consignor's agent, nor had he any authority to reship the goods from Copenhagen to another port."

When Mr. Timmins swore his affidavit, that of the Procurator-General had not been filed, and Mr. Timmins had probably little or no idea of the information which had been gleaned for the Crown by the intercepted telegrams, letters, and otherwise. No further affidavit has been made by Mr. Timmins or any one else on behalf of these claimants, and no attempt has been made to deal with the materials which raise suspicion, or to elucidate circumstances involving doubt, in relation to the *bona fides* of the transactions and claim. Not a single original book of account, letter book, or any other of the usual commercial documents which must have been kept by or for Mr. McCann in Copenhagen has been produced.

This Court has on various occasions during the present war pointed out the importance of producing original documents fully and promptly when a claim is made, and particularly where the *bona fides* of the claim is put in question. In the circumstances I say without hesitation that the bare account given of the transactions in Mr. Timmins's affidavit is not only wholly insufficient, but is also disingenuous and misleading.

The picture exhibited of the ordinary regular Danish trade carried on by Morris & Co., through Mr. McCann, is marred,



when alongside of it is seen the shipment and transport towards Copenhagen by this company of lard and meat products in less than a month more than quadrupling the annual quantity imported into Denmark from all sources for a year on the average of three years before the war.

In a letter dated November 25, in the "Ascher" correspondence (hereinafter referred to in connection with the claim of Cudahy & Co.), a firm of dealers in Hamburg well acquainted with the trade, wrote from Hamburg, "We met Mr. McCann of the Morris Provision Company on Change to-day [that was at Hamburg] back from Copenhagen. He was very sceptical with regard to the *Alfred Nobel* affair, and rather inclined to the opinion that the provisions on board of that steamer would never be allowed to reach Copenhagen, because it was too open-faced a case of the lard being intended for Germany to expect any other result." This letter was disclosed to the claimants a couple of months before the conclusion of the trial, but they did not deem it necessary, or perhaps expedient, to trouble themselves to contradict or explain the statement. The only way it was dealt with at the trial was by their counsel submitting that the letter was not evidence. I will deal with this question later, when the correspondence will be more fully referred to.

From other parts of the case it is shewn that one Erik Valeur also claimed to be an agent of Morris & Co. for Denmark, and to have acted as such in the sale of considerable quantities of the goods shipped on these vessels by Morris & Co. I will for convenience deal with this subject when I come to Valeur's claim. I note this, because the facts which will be there referred to have a bearing also upon the claim of Morris & Co., and also on their statement that their sole agent in Denmark was Mr. McCann.

I have already referred to a cablegram dispatched by McCann from Copenhagen to Morris & Co., at New York, on January 24, 1915: "Don't ship any lard Copenhagen. Export prohibited." The export had been prohibited by the Danish Government on January 11. This cablegram was, of course, subsequent in date to the seizure of the cargoes in these cases. Nevertheless it is neither immaterial nor unimportant. It testifies clearly to two things—that lard was not required by or for Denmark, and that the previous importation into

Copenhagen was in the main, at any rate, a mere stage in its passage into Germany.

In connection with the prohibition against exportation of foodstuffs it is well known, as a matter of public reputation, that, in order to avoid international difficulties, the Scandinavian countries, as neutrals, from good political motives, issued orders from time to time prohibiting the export from the respective countries of goods like lard, smoked meat, and other foodstuffs, oleo stock, hides, and rubber. For details of such prohibitions reference may be made to the affidavit of Mr. Henry Fountain, of the British Board of Trade, sworn on June 1, 1915. These are matters also which tend to throw light upon the question of the real destination of the goods nominally consigned to Copenhagen, and the Court is entitled to take them into consideration and to place them in the scales when weighing all the evidence.

In the course of the trial, upon the facts which had then been given in evidence, I addressed some questions to Mr. Leslie Scott, counsel for Morris & Co. I asked him whether in respect of the foodstuffs which Morris & Co. consigned to their own order, or to that of their agent at Copenhagen, and not to any independent consignee, he contended that they were "intended for a Danish market or for the German market."

His answer was: "My submission is that there is no evidence which they were intended for in regard to any specific consignment, but, that it was expected that the great bulk would find their way to Germany ultimately, is obvious." And that it was so expected by his clients, he said was obvious.

Then I observed, "In other words, those goods would not have been sent to Denmark if the Germans were not close by?" and Mr. Scott answered, "That is obvious." I then asked for information as to any merchant or person in Germany with whom Morris & Co. were in communication with reference to the shipments in question, which they expected would find their way into Germany.

The answer of their counsel was as follows. I will give the exact words, because there was some discussion as to what was said:

"It must depend upon the facts, as to which I have no instructions or evidence. The position seems a fairly clear one—that before the war, Hamburg, of course, was the great centre

of importation, not only for Germany, but for Denmark, and also probably largely for Norway and Sweden. Hamburg is the great free port of Northern Europe, and the bulk of the American foodstuffs went there, as your Lordship sees from the figures which were given in consequence of your question. After the war, and importation with that port stopping, two results happened, one was that the German demand for the civil population as before the war has to be met, and the neutral country, the United States, in the ordinary course of business, sets out to supply that demand. The second point is that the supply of Denmark and the other Scandinavian countries has to be met; but the particular importing ports of Germany being closed, the difference is that that great stream of produce going to Germany and the three Scandinavian countries goes to Scandinavian ports. Before the war, in the case of Morris and Company, they had agents in Germany. On the war breaking out, it is no use the agents remaining in Germany, but they go to Denmark. Mr. McCann goes to Denmark, and there is no question about that. They receive the consignments. That they should not be in communication at all with Germany and German buyers under those circumstances is obviously a ridiculous idea. No one would imagine it, and I do not suppose, apart altogether from any evidence in the case, that your Lordship, dealing with inferences of fact, would come to the conclusion that the representatives of Morris in Denmark were not in communication with any one in Germany. I am not here to put forward that suggestion."

At a later stage the learned counsel said, "It may be perfectly true that [the shippers] may have thought that the whole was intended—we know that the whole was not intended—for German consumption. I have never disputed it. I have always said the market through Copenhagen was Germany."

In connection with these statements, it is important to emphasise the point, which has already been adverted to, that the claimants, and McCann their representative, did not give the Court any information—all of which was within their power to give—as to the arrangements made for sending the "great bulk" or the "greater part" of the cargoes to Germany, as to who were the consignees, or the intended consignees, or as to what ports or places in Germany the cargoes were intended or expected to be sent.

In the course of a discussion at the trial (more particularly to be referred to in Armour's case) counsel for Morris & Co. expressed his readiness to produce evidence as to the amount of lard, bacon, and other products of the kind in question which Morris & Co. had supplied to Germany during the two or three years before the war. No such evidence has since been produced, although any necessary adjournment for the purpose was offered.

Before concluding the statement of facts as to Morris & Co., two other matters have to be mentioned. The first is that Stern & Co., in whose name certain goods were shipped, is a subsidiary company of Morris & Co., and the case of Stern & Co., by the request of counsel, was taken with Morris's claim, and treated as identical with it. The second is that the claim of ten claimants to certain parcels of goods shipped by Morris & Co., who allege they were owners of such goods as purchasers from the shippers, will have to be dealt with; and that facts affecting Morris & Co.'s position relating to those sub-claims must be taken as supplemental to those already adverted to in dealing with their direct claim.

The legal questions which arise with regard to the real destination of the goods claimed by Morris & Co. are identical with those arising in other claims. I will deal with these legal questions after the examination of the facts in all the cases.

#### ARMOUR & Co.

This American company had before the war a large subsidiary company—Armour & Co., Aktieselskab—at Copenhagen acting as agents. These agents (it is said) had always had strict instructions from the claimants to confine their sales to Denmark, other Scandinavian countries, Finland, and Russia, and not to sell to any other countries, as the claimants had agents in other countries, and the operations of each agent were to be strictly confined to his particular district.

The Copenhagen office was a small one. The staff consisted of a manager, clerk, office boy, and typist, according to the evidence of the Procurator-General; or of a manager, assistant salesman, chief accountant, assistant accountant, and office boy, according to the affidavit of Mr. Urion.

Before the war the claimants' principal branch was at Frankfort, where their German business was carried on.

No information was given by the claimants as to what became of, or as to what was done at, this branch after the war.

As to the Copenhagen office, not even the name of the manager was given to the Court. No one from Copenhagen favoured the Court with any evidence as to the extensive transactions involved in the shipments by these claimants.

Armour & Co.'s direct claim is to nearly eight million lb. of foodstuffs. When the amounts of their alleged vendees' claims are added, the total is over  $9\frac{1}{2}$  million lb. This enormous quantity was consigned to their agents at Copenhagen within one month. How came it to be sent? What were the instructions of the anonymous manager at the Copenhagen office with regard to its disposal? With the exception of comparatively small quantities of casings, canned beef, and fat backs, it was all lard of various qualities. The average monthly quantity of lard exported from the United States to all Scandinavia in October and November, 1913, was 427,428 lb.; a year later, in about three weeks (from October 20 to November 11, 1914), it is shewn that this one company was shipping to Copenhagen alone considerably over twenty times that quantity.

It was deposed by the Procurator-General that Armour & Co.'s shipments to Copenhagen of hog products from October to December, 1914, were approximately equivalent to their total shipments to Copenhagen during the whole preceding eight years. These figures were not contradicted or contested. In the course of the hearing an opportunity was given to the claimants to deal with these facts, and to produce evidence of what the imports into Germany by or through Armour & Co. of similar products were during the two or three years before the war. The Crown did not oppose any adjournment which might be necessary for this purpose. Sir Robert Finlay, as counsel for Armour & Co., said, "We will get that statement without delay as to the amount of those articles (*viz.* lard, bacon, and other foodstuffs) exported in three years before the war into Germany by Messrs. Armour & Co." No such statement was produced, and therefore (as I intimated during the discussion) I have to decide upon the materials which had been placed before me at the conclusion of the hearing.

The claim of Messrs. Armour & Co. (dated April 21, 1915) was made on the ground that the goods were their property as neutrals shipped on neutral vessels, and consigned to neutrals

at a neutral port; and that the goods were not intended for sale to or use by or on behalf of an enemy Government or the armed forces of an enemy. The main evidence in support of the claim was an affidavit sworn May 27, 1915, by Mr. Meeker, one of the vice-presidents and managers of Armour & Co. It is practically in the same terms as the affidavit sworn in support of the claim of Morris & Co. It is indeed a "common form" affidavit. The pith of it is that "the whole of the said goods were shipped to the order of the agent in Copenhagen for sale in the agent's own district in the ordinary course of business. The standing instructions to the agent that no sales were to be made outside the agent's district were never withdrawn by the claimants, and the agent had no authority to sell the goods except to firms established in Denmark, other Scandinavian countries, Finland, or Russia."

Germany is not named, and the impression conveyed, and clearly intended to be conveyed, was that the goods were shipped and consigned for purely Scandinavian business, as if the war had not intervened.

As to the shipment on the *Kim*, however, there was this additional paragraph: "The s.s. *Kim* sailed from the Port of New York on November 10, and up to that time the claimants had no knowledge whatever of the Order in Council of the British Government of October 29, 1914, which was not received by the State Department at Washington until after the said vessel had sailed."

That is not in accordance with the facts, for the Order in Council had been notified to the American Ambassador on October 30, and was published in New York on November 2.

Further affidavits were filed. One was by Mr. Finney, which is wholly immaterial. Another by Mr. Garside, dealing only with the part of the shipment which consisted of canned beef, to which reference will be made hereafter. The last was by Mr. A. R. Urion, and was sworn about a week after the hearing in Court was commenced. Mr. Urion deals with various matters before the war, but as to transactions after the outbreak of war he deposes as follows:

"Par. 6. None of the goods shipped by Armour & Co. to the Copenhagen company subsequent to the outbreak of war were sold to the armed forces or to any Government Department of Germany or to any contractor for such armed forces or

Government Department. About 90 per cent. of the goods were sold to firms who had been customers of the company and established in Denmark and Scandinavia for many years. These sales were all genuine sales, and payment was made against documents in the ordinary way, and on delivery Armour & Co.'s interest in the goods absolutely ceased."

It is to be observed that he does not specify what the goods were, or to whom or when they were sold. The statement about the genuine sales of 90 per cent. cannot refer to the goods in the four ships in question. Such a statement as to those goods would be wholly untrue; and when he talks about payment and *delivery* of the goods, that must refer to some other goods, because those now in question never were delivered. It is significant that in this last affidavit filed for the claimants Mr. Urion avoids altogether any explanation of the shipment, or sale, of the goods which his company now claim.

Part of the shipments consisted of canned beef in tins. The quantity was 5,600 dozen tins of 24 oz. each net, equal to 100,800 lb. There was evidence before me on behalf of the Crown that cases of this size were not usual for civilian markets; that large quantities of this particular brand of tinned meat in tins of that size had been offered for use in the British army; and that these packages could only have been intended for the use of troops in the field. Evidence was given for the claimants to the contrary. But it is important to observe that no evidence was given that a single tin of that kind had ever been sent by Armour & Co. into Denmark before the war, nor, indeed, that any had been sent theretofore to Germany for the civilian population. I do not say that it was proved that none were so sent. But it was not proved that any had been sent. Mr. Garside's affidavit dealing with this matter is vague, and supplies no evidence that a single pound of canned meat in these tins had ever been sent before the war to Denmark or to Germany. This was pointed out to Sir Robert Finlay during the argument, and in consequence the promise (already mentioned) to supply a statement as to this was made.

Although the claim, which had formerly been put forward upon the affidavits, was that the goods shipped by Armour & Co. were sent in the ordinary course of the Danish or Scandinavian business, it is significant that at the hearing the ground

adopted by Sir Robert Finlay was not the same. I will not paraphrase his statement of this ground, but will give his exact words: "My case is not that they were all to be consumed in Denmark or Norway; my case is that they were not consigned to the German forces, and it was almost certain there was no continuous voyage." Upon this the Solicitor-General intervened, and said, "I think I heard my learned friend say a moment ago that his case was not that these goods were destined for Danish consumption but for German civilian consumption." Then Sir Robert Finlay answered: "No; I said that our case was not that the goods were intended for consumption in Denmark, but that the persons to whom they were consigned sold them to Germany."

But, as will be seen from the figures already given of the goods shipped by Armour & Co., less than one-fifth were said to have been sold to consignees, and the undisputed fact is that more than four-fifths had not been sold, and these are in fact claimed by Armour & Co. as having remained their property. There are several references to Armour & Co. in the "Ascher" correspondence, but one passage refers to them alone and specially, and some explanation of it might have been expected. It relates to another vessel, but it illustrates the nature of Armour's business with countries contiguous to Germany in November, 1914.

On November 11 E. Ascher write to Cudahy & Co.: "Mr. Boerenbrink had a conversation with the representative of Armour & Co., in Rotterdam, who assured him that his principals had booked several parcels of stuff intended for German buyers on the s.s. *Maartensdyk* without being compelled to sign a declaration; and, if this is according to fact, we cannot explain why Messrs. Armour & Co. should be in a position to accomplish what you cannot."

More facts relating to the shipments of Armour & Co. will be stated when I deal with the claims of their alleged vendees—namely, the Provision Import Co., Christensen & Thøgersen, Brødr Levy, Hansen, and Frigast—and the present statements as to their direct claim must be supplemented by any material facts emerging from the consideration of the sub-claims.

Finally, I note that the claimants did not produce any letter, telegram, contract, or any other document passing between them and their agents in Copenhagen touching any part of the



enormous quantities of goods shipped, and not one single book of account or commercial document of any kind kept by their agents in Copenhagen dealing with the goods claimed was disclosed.

SWIFT & Co. AND HAMMOND & Co.

These two firms are connected, and their claims were taken as one. Together the goods they shipped amounted to over  $3\frac{1}{4}$  million lb., Swift & Co. consigning over two million and Hammond & Co. over one million lb. In all cases the consignments were to their own order. No part of Swift's two million lb. had been sold, or contracted to be sold, to any one at the time of seizure. (It had been alleged and sworn by Mr. Edward Swift that a portion had been sold to one Dreyer, of Aarhus, but at the hearing this was not relied on.) But it was alleged that a considerable part of Hammond's goods had been sold to two firms, Buch & Co. and Bunchs Fed, whose sub-claims will be dealt with hereafter.

The affidavit in support of the claim was in the same common and perfunctory form as those in the last two cases.

The unnamed "salaried employee" and "agent," and the standing "instructions" to the agent to confine his sales to his district (in this case "Denmark"), the consignment "for sale in Denmark" and "only to firms established in Denmark," have become stereotyped. At the hearing it transpired that the person to whom the two companies entrusted the transaction of the business was one Peterman, their manager at Hamburg. After the war an intercepted cablegram shewed that on September 1, 1914, Swift instructed their agents at Rotterdam to ask their Hamburg office if it recommended consignments of meats and lards to a bank at Copenhagen, and, if so, what quantities, and who would sell, and what percentage of invoice value they could draw. The Court was not informed what answer was given by Peterman. At an early date, September 16, 1914, Peterman advised the companies to discontinue consigning their products. Nevertheless, later it is found that they cabled to Peterman to make sure to arrange proper storage at Copenhagen for their consignments, in view of the possible large number of consignments by other parties.

Again, Peterman is asked if he can insure against war risk by other than German companies, and, if not, to give name and financial standing of German companies, and to get assurance

that losses would be promptly paid without complications. Before the war a person of the name of Stilling Andersen, of Copenhagen, seems to have been entrusted with whatever business the claimants had in Denmark. After the seizure of the first three vessels, and after the sailing of the fourth, Swift & Co. write to Lane & Co. (who represented them in London) a letter (November 17), in which they say: "If it is necessary for you to obtain proofs of our ownership, will you kindly apply to Mr. H. Peterman, Copenhagen, at which point we have opened an office, in order to facilitate the handling of our business in Denmark under the existing disadvantageous conditions. For your guidance, it might be well for us to mention that our business in Denmark for many years past has been carried on under the jurisdiction of our Hamburg office, Mr. Peterman there having charge of same."

Neither Mr. Peterman, nor any one acting for Swift & Co. or Hammond & Co. in Copenhagen, nor any one from their Copenhagen bankers, made any affidavit or gave any evidence relating to the business in which the large shipments in question were made.

The situation was described by counsel for Swift & Co. as follows: "It comes to this, Stilling Andersen was the agent in Copenhagen. He was under the control of Peterman in Hamburg. The business that was done in Denmark was handled from Hamburg, Stilling Andersen being the local agent. Then when Peterman came across to Copenhagen Peterman would be the person still in control, although I daresay Stilling Andersen would still be the agent, though probably under the control of Peterman."

Later on (but before December 10) Peterman's name was entirely dropped out, and in the cablegrams relating to the business the name of "Davis" was used for Peterman. No evidence was given to explain why this *alias* of Peterman was adopted and used, nor was any evidence produced to shew how the *alias* had been communicated to the Copenhagen or Hamburg offices. No book of account, or correspondence or document of any kind kept by Peterman or any other agent of the claimants at Copenhagen relating to the business was disclosed.

Thus was the case of Swift & Co. and Hammond & Co. left.

## SULZBERGER &amp; SONS Co.

This company's direct claim relates to close on 1½ million lb. Their goods were shipped on all the vessels. There is a sub-claim by Pay & Co. for over 800,000 lb. The consignments claimed by Sulzbergers were all to their own order, Leopold Gyth, of Copenhagen, being the party to be notified. It was said that Gyth was, since August 1, 1914, the agent of the company for the sale of its products in Denmark. For some years before that Pay & Co. were the agents, and there was a controversy as to whether their agency had really ceased at the time of the seizure.

In a letter written by Pay & Co. to Sulzbergers, on July 20, 1914, they explain that the sales for the company had been retrograding, owing to the manufacture of vegetable margarine having become predominant in Denmark, 80 per cent. of the produce being vegetable. In these circumstances it is strange that no evidence was forthcoming from Gyth, or any one else, to explain these large shipments. It was put forward in the affidavit that the bills of lading had been dispatched through a bank to Copenhagen—I assume to a bank there—and that they had been returned. No correspondence was produced as to this, nor was there any evidence from any Copenhagen bank. There is very little trace of anything which Gyth, the alleged agent, really did. I think there is only one cablegram to him at Copenhagen in 1914 amongst those intercepted. That was sent on October 16.

Other people connected formerly, and probably at the time, with Sulzbergers' Hamburg office were much more active. The earliest record of the Sulzberger transactions after the war which was produced to the Court was a letter of September 21, written by Sulzbergers from Hamburg to Pay & Co. It is an important letter, shewing what Sulzbergers' business projects at the time were, and to what devices they were willing to descend in order to get goods into Germany. It is best to set it out *verbatim*:

“Hamburg, September 21, 1914.

“Messrs. Pay & Co., Copenhagen.

“Dear Sirs,—We acknowledge receipt of your esteemed favour of 17th instant; contents of which duly noted. It is possible for us to buy great quantities of oleo and lard, &c., from America c.i.f. Stettin. We beg to ask you whether it is possible

to send the goods from America, *via* Copenhagen to Stettin, if the bill of lading bears the following inscription, 'Party to be notified, Order Pay & Co.,' so that you stand *quasi* as consignee. You had then to transmit the goods for us to Stettin, for which we are willing to pay you a small allowance. We await your kind news as to this point. Concerning Mr. Leopold Gyth, is at present nothing to be done with this gentleman, which is not astonishing under the critical circumstances prevailing.

"Very truly yours,

SULZBERGER & SONS Co."

Here are the claimants, through their Hamburg office, scheming to do what the Crown contend they intended to do in relation to the goods seized. Pay & Co. declined to comply. Whether Pay & Co., or Gyth, afterwards did what they were asked to do is another matter. But Gyth is afterwards named in all the bills of lading as the party to be notified. No explanation of this circumstance was vouchsafed.

Two German representatives of Sulzbergers — namely, Christiansen and Saemann—are afterwards at a Copenhagen hotel, and are active over the cables. One of them shews that Christiansen, and not Gyth, was dealing with the war risk of the *Fridland*. Saemann in another (his twentieth cable) suggests the discontinuance of selling until cargoes seized should be released; and again he cables that he could ship to Sweden, "but that guarantee was required," which, of course, meant guarantee against exportation. In connection with this it may be noted that Saemann cabled, again from Copenhagen, in January, that exportation of lard, casings, and fat backs from Norway had been prohibited; and Pay & Co. also cabled to them, "Don't ship any lard Copenhagen," after exportation from Denmark had been prohibited; in what capacity, whether as agents or not, was not explained.

It is interesting to note that Sulzbergers, of Liverpool, in reference to these prize proceedings, ask the claimants over the cable, "Will it be convenient call witnesses from port destination show goods not intended enemy use." Whether there was an answer to that question I do not know, but the practical answer at the hearing was that it could not have been deemed convenient, as no witness from Copenhagen gave evidence either verbally or by affidavit.

In November a cablegram shews that Sulzbergers had also supplied, or offered to supply, their corned beef to the French Government. This they had a perfect right to do, subject to any risk of capture by enemy ships. It would be strange if they had been unwilling to do the same for Germany. The risk of capture of goods sent to France was very small compared with the risk of goods consigned to Germany. Dealings with the French Government could accordingly be had direct with practical safety. If there were to be transactions with the German Government, a much more indirect and involved plan may well have been deemed expedient.

No particulars were given of any business carried on by the claimants at Copenhagen before the war. As in other cases, no books of account or any documents from the Europe end were disclosed, nor indeed any document except the bills of lading and insurances. No evidence was given by Sulzbergers touching the goods alleged to have been sold to Pay & Co.

Further facts relating to the claimants will be given in dealing with the claim of Pay & Co.

#### CUDAHY & Co.

The direct claim of this company is in respect of 176,559 lb. of lard and beef casings shipped on the *Alfred Nobel* and the *Fridland* to their own order—party to be notified Schaub & Co. The shipments were before the Order in Council of October 29.

The grounds of their claim are that they had sold the goods to Schaub & Co. for the Danish business of their firm at Esbjerg; that they had drawn upon them for the price, but that the drafts were not accepted by reason of the seizure; and that the goods remained the property of the claimants.

The claimants were dealing with the French Government, and they were in close communication with E. Ascher & Co., of Hamburg, with reference to their trade with Germany, as the Ascher correspondence so clearly shews.

The claimants were quite open to carry on a trade in contraband with the enemy, as the facts clearly shew. But the question as to the goods they now claim is whether they steered clear of dangers by a *bona fide* sale to Schaub & Co., of Copenhagen, for use in Denmark. It was said that, as to the lard (which was the chief consignment), it was to go through a refining process at Esbjerg. Whether afterwards the

refined lard would have been sent to Germany is immaterial upon the question now before the Court, if it was at the time of seizure on its way to Denmark to a purchaser who intended to put it through a manufacturing process there.

The documents in this case were put fairly before the Court, and although there are circumstances of suspicion, the conclusion to which I have come is that there were *bona fide* contracts of sale of the particular goods claimed by Cudahy & Co. to Schaub & Co., of Copenhagen, and that these goods were on their way to Denmark as their real and *bona fide* destination, and were intended to be imported on their arrival into the common stock of the country.

The larger proportion of Cudahy's shipments is the subject of claims by Christensen & Thøgersen, and Elwarth, which will be dealt with in their appropriate places.

I have now stated the separate facts affecting the cases of the American shippers, and before proceeding to the cases of the alleged Scandinavian purchasers I will refer shortly to what I have called the "Ascher" correspondence. This was a series of intercepted letters written from Hamburg by Ascher & Co. to the last-named claimants—Cudahy & Co.—some before the seizures and others afterwards. I read them for general information as to the circumstances in which it was known the trade in conditional contraband was carried on, and I find in them cogent corroboration of many facts and inferences already, I think, sufficiently established without them. They sound almost like a talk between merchants "on Change" relating to a trade rendered interesting through the commercial risks which its manipulation involved. If the correspondence could have been completed by the inclusion of the letters from America in reply it would have been still more elucidating. The letters shew an intimate knowledge of what was being done by the various shippers in reference to consignments of foodstuffs to Copenhagen, with the difficulty of exportation from Denmark to Germany, and with the probable fate of some of the cargoes now before the Court.

It was objected that they would not be evidence against any persons other than Ascher & Co. and Cudahy & Co., and that they ought not to be read in any of the other cases. If they stood alone I should not act upon them as affecting those cases. But it must be remembered that Prize Courts are not governed

or limited by the strict rules of evidence, which bind, and sometimes unduly fetter, our municipal Courts. Such strict evidence would often be very difficult to obtain, and to require it in many cases would be to defeat the legitimate rights of belligerents. Prize Courts have always deemed it right to recognise well-known facts which have come to light in other cases or as matters of public reputation.

In the case of *THE ROSALIE AND BETTY* (2 C. Rob. 343) Lord Stowell discussed the subject generally, and said: "In considering this case I am told that I am to set off without any prejudice against the parties, from anything that may have appeared in former cases; that I am not to consider former cases, but to consider every case a true one, until the fraud is actually apparent. This is undoubtedly the duty in a general sense of all who are in a judicial situation; but at the same time they are not to shut their eyes to what is generally passing in the world." Then he refers to well-known facts and expedients relating to illegal trading and fraudulent practices during war, and adds: "Not to know these facts as matters of frequent and not unfamiliar occurrence would be not to know the general nature of the subject upon which the Court is to decide; not to consider them at all would not be to do justice."

I will pause only to give one illustration from the American authorities. In the judgment in *THE STEPHEN HART* (Blatch. Pr. Cas., at p. 403) the Court read from a statement by the Solicitor-General (Sir Roundell Palmer) in the House of Commons relating to the contraband trade between England and America by way of Nassau the following passage:

"The then Solicitor-General of England (Sir Roundell Palmer) stated in the House of Commons on the 29 June last, referring to the case of *THE DOLPHIN* (7 Fed. Cas. 868; Moore's Int. Law Journal, vol. 7, p. 700) and *THE PEARL*, decided by the district Court of Florida . . . that it was well known to everybody that there was a large contraband trade between England and America by way of Nassau; that it was absurd to pretend to shut their eyes to it; and that the trade with Nassau and Matamoras had become what it was in consequence of the war"; and the learned Judge in the same case in another passage said: "The cases of *The Stephen Hart*, *The Springbok*, *The Peterhoff*, and *The Gertrude* illustrate a course of trade which has sprung up during the present war, and of which this

Court will take judicial cognizance, as it appears from its own records and those of other Courts of the United States, as well as from public reputation."

The "Ascher" letters having been written to one of the big shippers, and with intimate knowledge of this trading, and being obviously genuine, and indeed never intended to see the light in this Court, I consider that on general principles the Court was entitled to read them, and so to inform itself as to this trade generally, without, of course, allowing any statements in them to injuriously affect any claimant, especially if there was no opportunity for him to deal with them. It is right to add that if I had not been made acquainted with their contents my decision in every case would have been the same. But they do give a sense of mental satisfaction in regard to inferences which have been drawn.

I will now proceed with the cases of the alleged purchaser claimants.

#### PAY & Co.

This firm claim goods to the extent of 1,710,818 lb., shipped on the four vessels. The shippers were Sulzberger & Sons Co., Morris & Co., and the South Cotton Oil Co.

The consignments were to the order of the shippers, and in the case of Sulzberger & Co. the parties to be notified were Pay & Co.; in the case of Morris & Co. the parties to be notified were Morris & Co., of Christiania; and in the case of the South Cotton Oil Co. no parties to be notified were named.

The substantial question in this case is whether Pay & Co. were merely agents of the consignors or independent purchasers.

Pay & Co. say they were for many years before the war, and remained after the war, agents for Sulzbergers. There is a conflict between their statement and that of Sulzbergers as to their agency. The latter say the agency of Pay & Co. ceased after August 1, 1914. No contracts for the purchase of the goods claimed by Pay & Co. were produced, but certain invoices were sent by them to the Procurator-General, and they allege that they paid for the goods. Except as to a small portion of the goods shipped by Sulzbergers on the *Bjornstjerne Bjornson*, and of the goods shipped by the Southern Cotton Oil Co. on the *Fridland* (of the alleged sub-sales of which no particulars or satisfactory evidence was given), the goods they claim were not sold before the seizure, but were, according to



their account, bought for the purpose of adding to their stock to be sold and consumed in Scandinavian countries.

In the affidavits filed on behalf of the claimants it was deposed that the "drafts for all the goods were duly paid" by them. None of the drafts were produced. At the hearing certain letters from the bankers were produced in order to establish that payments had been made. These documents referred to some arrangements made after the seizure. They do not shew what, if any, sums were paid, but refer to certain arrangements to debit, which were only book entries. I saw none of the books. No evidence has been adduced from the bankers themselves, nor was any explanation given of the communications from Pay & Co. which led to the bankers writing the letters referred to.

It ought to have been easy for the claimants to shew by documents when and how, and at what price and on what terms, they purchased the goods, if they really were purchasers on their own account, and to prove, if that was the fact, that payment was made as alleged. The claimants aver that when the war broke out they received letters from the American slaughtering firms asking them to assist the American houses in sending goods to German buyers, but that they refused to entertain the proposition. They do not say whether the request came from the shippers of any of the goods they now claim. They ought to have done so. The not unnatural inference is that it did. No evidence whatever has been given by any of the consignors in regard to the goods claimed by Pay & Co.

After a careful consideration of all the circumstances, I have come to the conclusion that the claimants have not shewn that the goods were sent to them as purchasers, but that they were sent to them as agents for the consignors. Even if they had intended to purchase the goods for themselves, they have entirely failed to satisfy me that they had become the owners of the goods.

#### THE PROVISION IMPORT CO.

This is a Danish company carrying on business in Copenhagen as importers and dealers in lard stock, &c.

Their direct claim is to 1,176,050 lb. of lard and oleo stock, shipped on the *Alfred Nobel* and the *Fridland*. The shippers were Armour & Co.—the consignees Armour & Co., of

Copenhagen—and the parties to be notified were the Provision Import Co.

The case for the claimants is that they bought and paid for the goods from the shippers through their agents at Copenhagen in the ordinary course of business, and that the goods were intended to be and would have been disposed of in their business in Scandinavia if they had been delivered. They give particulars of sub-sales in Denmark and Sweden to margarine manufacturers before the seizure. These sub-sales comprise over 200,000 lb. of the goods—the other portion, over 900,000 lb., they say had not been sold at the time of seizure.

The Crown's case was that the sales were not real sales, but that the Provision Import Co. were merely to deal with these goods as agents for the shippers.

There is evidence that before the war they bought goods from Armours; there is no evidence that they were ever agents for them. In the affidavit of the Procurator-General the Provision Import Co. were said to be the representatives of Hammond & Co. in Copenhagen, but they are not in these cases involved in any of the Hammond shipment transactions. I only find them once mentioned in the intercepted Armour cablegrams. That is on October 29, a date subsequent to those given for the purchases of the goods in question, but anterior to any seizures. That cablegram is consistent and, I think, only consistent with their being the purchasers in the case it refers to.

The documents were fairly completely produced to the Court by the claimants. In my opinion the right conclusion is that the Provision Import Co. were *bona fide* purchasers of the goods they claim.

#### CHRISTENSEN & THOEGERSEN.

This claim is in respect of goods shipped by Morris & Co. on the *Alfred Nobel* and the *Bjornstjerne Bjornson*; by Cudahy & Co. on the *Alfred Nobel* and the *Fridland*; and by Armour & Co. on the *Fridland*. The shipments were all, therefore, before the Order in Council of October 29, 1914.

The main question as to these goods is whether they were sent to the claimants as selling agents for the shippers or as purchasers on their own account. The affidavits of Mr. Thøegerson, the sole proprietor of the firm, acknowledge that they

sometimes acted as agents, but say that these particular goods were sold to, and bought by, them as purchasers, and that as to the greater part of the goods, the claimants had sold them to their own customers in Denmark, Sweden, and Norway, some before the sea voyage commenced, and others during transit. Particulars of these sub-sales were given.

The "Ascher" correspondence throws some light on the situation as between Christensen & Thoegersen, and Cudahy & Co. I am now going to refer to it as being helpful to some of the claimants.

In a letter of November 25, 1914, Ascher writes: "We are glad you have been able to do so heavy a business with Messrs. Christensen and Thoegersen, and of a portion of it they have already reaped the benefit, for we have been informed that heavy lines of lard of your brand have been already distributed amongst German buyers, particularly in the East by way of Stettin. How they will fare with subsequent shipments is problematical, for the fate of the s.s. *Alfred Nobel* is still quite uncertain."

And in a later letter (January 6 last): "As for Christensen and Thoegersen, they are said to have made so much money out of the war that even a big loss would not be greatly felt by them, if the *Nobel* should be permanently lost. This, however, we think is out of the question so far as neutral owners of the cargo are concerned."

I cannot doubt that Christensen & Thoegersen did sell large quantities to Germany of goods imported from the American meat packers.

It is sworn that the drafts which appear by the documents to have been drawn by the shippers on the claimants were duly paid. I should have desired better evidence upon this point; but the dispute really is not whether the title to the ownership of the goods had passed, but whether in these particular transactions the claimants were acting merely as agents, or intermediaries for the consignors, or were purchasers. The passages I have read from the "Ascher" letters are more consistent with their being purchasers; and, upon the whole, the conclusion to which I have come is that the goods claimed were shipped to them as *bona fide* purchasers, and not as agents.

## BRÖDR LEVY.

This firm of merchants ("dealers in herrings, codfish, and provisions") claim lard and fat backs, shipped by Morris & Co. to their own order respectively.

The proofs in this case are not satisfactory. The goods comprised in bill of lading 11 on the *Kim* are also claimed by Morris & Co., and those in bill of lading 62 on the *Kim* are also claimed by Armour & Co. The goods claimed from the *Alfred Nobel* are said to have been bought from Conrad Bang, an agent for Morris & Co. at Copenhagen, and from Backstrom, their agent at Stockholm.

An alleged copy of invoice, dated October 26, 1914, was exhibited, which says the goods were intended for the *Alfred Nobel* (which had sailed six days before), and that they had been war-insured at Copenhagen. In relation to all the goods claimed there is a bare statement that payment was made without any dates, amounts, or particulars whatsoever.

The claimants did not produce any of the shipping documents. No affidavits were made by Bang or Backstrom, or by any one from Armour's Copenhagen office. The claimants do not say whether they had dealt in lard or fat backs before or not. No dates appear on the invoices. The shippers, who are said to have been paid, also lay claim to close on half of the goods. Altogether, the proofs are deficient.

I am not satisfied that the goods claimed were sold to the claimants, or that they had paid for the goods, or become the owners thereof, and the claim fails. As to the goods also comprised in the claims of Morris & Co. and Armour & Co., they must be treated, therefore, as having been shipped by the shippers to their own order, and remaining their property at the time of seizure.

## VILHELM ELWARTH.

Mr. Elwarth has put forward two claims—one dated April 10, 1915, to 61,000 lb. of lard shipped by Cudahy & Co. on the *Alfred Nobel*—to their own order—party to be notified, Ernst Ascher & Co., of Rotterdam; and the other, dated June 1, 1915, to 88,618 lb. of oleo oil, shipped on the same vessel by the Consolidated Rendering Co., of Brightwood, Massachusetts—to their own order—with the same party to be notified.

It is necessary to investigate closely the position of Vilhelm Elwarth. He was described in the affidavit of the Procurator-General as the agent in Copenhagen of E. Ascher & Co., of Hamburg. In his affidavit in reply he does not deny that, although he denies agency *qua* the particular transaction. In his affidavit of May 15, in support of the first claim, he said he carried on business in Copenhagen as a provision merchant, with a large number of retail dealers as customers. In that of June 14, in support of the second claim, he has become an import merchant, frequently importing into Denmark, among other things, oleo oil. His case is that he bought both the lard and the oleo oil at different times from Ernst Ascher & Co., of Rotterdam. The latter are agents for E. Ascher & Co., of Hamburg. He alleges that he bought the lard verbally on September 26 on a personal visit of some one to him at Copenhagen; that payment was to be by draft against documents; and that "in due course" he paid for the said goods and took up the documents. The draft was not produced, and no dates or further particulars of payment are given. The oleo oil he says he bought verbally at Rotterdam on July 25 and 28, 1914, and that payment was to be by net cash. The documents purporting to be invoices for all the goods bear date November 3. No explanation was given of how the claim to the goods comprised in the earlier contract was not made till a couple of months after the claim to the goods, the subject-matter of the later contract.

The Ascher letters, written by his principals, throw light upon the lard transaction, and upon the rest of Elwarth's claim. It will be remembered that evidence was given, and not contradicted, that he was Ascher's agent at Copenhagen. In a letter to Cudahy of November 7 Ascher & Co., of Hamburg, appear to treat the lard as having been their property. They say, "Nor are we sure that the war-risk on the 500  $\frac{1}{2}$  barrels of pure lard on board the s/s *Alfred Nobel* had been taken out by your goodselves, *not having received a debit note* of the charge up to the present." Later, in the same letter, they say that it had been sold by their Rotterdam office "to a Danish firm." These were the consignments of lard claimed by Elwarth. Elwarth is not named, although he was well known; and it is doubtful whether he was the person referred to, as he does not appear to be a member of any

"firm." After the capture of the *Alfred Nobel* they write (November 20) that they were interested both in the lard and oleo oil: "We are watching the development with much interest, although we ourselves are interested only with those 500 half-barrels of lard of yours, and a couple of hundred tierces of oleo, both of which we are happy to say are fully covered against war risk, so that in the worst of cases we cannot lose much."

Those were all the goods claimed by Elwarth.

They had in the meantime also suggested that consignments to them should be made ostensibly to Elwarth. They wrote: "We suppose if Rotterdam were to cable you 'Ship sales Elwarth,' you would understand that this meant a request to have our purchases forwarded to Copenhagen, either to the address of our agent at that city, Mr. Vilhelm Elwarth, or to your order, party to be notified, Vilhelm Elwarth, Copenhagen. It might be right also in that case for you to invoice the goods to Mr. Elwarth, handing on a copy of the invoice simultaneously."

The correspondence refers frequently to Elwarth, and it contains a testimonial to his assiduity and fidelity as an instrument of Ascher & Co., Hamburg, since the beginning of the war in these words: "We repeat that we consider ourselves responsible for any shipments you may be making to Mr. Elwarth during this period, and we are glad to say he has proved himself entirely reliable in all transactions which we had to let go through his hands since the beginning of the war."

I have come to the conclusion that the claim made by Elwarth is not a *bona fide* claim on his own behalf. He was not a purchaser from Ascher & Co., of Rotterdam, or of Hamburg. He was merely a nominee of theirs. The goods are not claimed by any person entitled to them, and therefore they stand to be treated as goods unclaimed.

PETER BUCH & Co.

A claim was put in on behalf of this firm to goods covered by bills of lading on three of the vessels. The total quantity of the goods thus claimed was 752,908 lb. They were all shipped by Hammond & Co. to their own order.

Although the claim was entered, no evidence whatsoever was adduced, nor was any document produced in support of

it. Counsel appeared for some underwriters in the names of Buch & Co., but had not been supplied with any documents or materials.

The evidence for the Crown was that Peter Buch & Co., of Copenhagen, were very large exporters of provisions to Germany, and were a branch of the firm of that name in Hamburg. The shippers gave no evidence as to these shipments.

As no evidence was adduced in support of the claim, it necessarily fails.

J. O. HANSEN.

The subject-matter of this claim is a quantity of lard and fat backs amounting to 400,625 lb. Mr. Hansen says he is a Danish dealer in such goods. He claims four parcels of goods—one parcel each on the *Bjornstjerne Bjornson*, *Fridland*, and *Kim*, consigned by Morris & Co. to their own order; and another parcel on the *Kim*, consigned by Armour & Co. to their own order.

He alleges that he bought the goods shipped by Morris from Erik Valeur, and those shipped by Armours from their Copenhagen office. He adds a schedule purporting to give a list of his alleged purchases and re-sales, but he did not produce a single document relating to any of the transactions—no contract, invoice, bill of lading, draft, receipt, account, or anything else. No explanation or excuse was made for this. Erik Valeur was the representative in Copenhagen of Morris & Co. He made an affidavit in support of his own claim, to which reference may be made by way of criticism of this claim. He alleged that he bought some goods for Morris on his own account, and sold others as agent. How he came to decide which was which he did not explain. The goods claimed by Hansen on the *Bjornstjerne Bjornson*, Valeur says, he bought on his own account. The sale to Hansen, he says, was on September 30, although Valeur himself says he only bought on October 6.

Hansen has entirely failed to shew that he was the purchaser or owner of any of the goods. His claim is quite unsupported, and I cannot accept it.

SEGELCKE & Co.

Mr. Eilert Segelcke, the sole proprietor of this firm of wholesale dealers in lard and bacon in Copenhagen, claims

275,297 lb. of lard and fat backs shipped by Morris & Co. on the *Bjornstjerne Bjornson* and the *Kim* to their own order. The claimants say they bought the goods partly through Valeur and partly through Conrad Bang (agents for Morris & Co.). According to the affidavit of Eilert Segelcke, sworn May 18, 1915, the various goods were paid for at different times.

I am prepared to accept the account given by Segelcke as accurate. Accordingly I find that his firm were *bona fide* purchasers of the goods they claim.

PEDERSEN FOR THE FAELLESFORENINGEN DENMARKS  
BRUGSFORENINGER.

This is a claim to 45,219 lb. of neutral lard shipped on the *Bjornstjerne Bjornson* by Morris & Co. to their own order. The goods are also claimed by Morris & Co. themselves.

In the affidavit of Pedersen of March 19 it is deposed that the goods were bought for the purpose of keeping up the stock, so that the firm could comply with orders for margarine "from the members."

No document is produced. The deponent does not even state from whom the goods were bought or what the date of the alleged purchase was, and he does not allege that any payment was made. In a subsequent formal claim (April 9, 1915), the grounds of claim state that the goods were bought from Erik Valeur, who, in the first instance, had himself bought the goods at an agreed price, c.i.f. Copenhagen, and had taken up the documents and paid for the goods. On looking at Valeur's own account in his affidavit the statement is—not that he had bought or paid for the goods, but that he sold them to Pedersen's firm as agent for Morris & Co.

In these circumstances the claimant's proof is quite unsatisfactory, and accordingly, particularly as Morris & Co. themselves also claim the goods, I decide that Pedersen's firm have failed to establish their claim. So far as they are comprised in the claim of Morris & Co. they fall to be treated as goods which remain unsold.

HENRIQUES & ZOYDNER.

This firm claims 81,096 lb. of lard shipped on the *Bjornstjerne Bjornson* by Morris & Co. to their own order. The affidavit in support of the claim contains the bare statement that this lot was purchased for the purpose of keeping up the



firm's stock. There is no statement as to the persons from whom the purchase was made, what its terms were, what the purchase price was, or that the price, whatever it was, was ever paid. In a subsequent formal claim (unsworn) the grounds of claim state that the goods were purchased from Mr. Erik Valeur; that Valeur had, in the first instance, purchased the goods at an agreed price, c.i.f. Copenhagen, and that the documents therefor had been previously taken up and paid for by him. This statement is in direct contradiction to that of Valeur himself (in the affidavit already referred to), where he says he sold these goods merely as agent for Morris & Co.

My conclusion is that the claim of this firm has not been established.

#### M. FRIGAST.

This is a claim to 15,750 lb. of lard shipped by Armour & Co. on the *Bjornstjerne Bjornson*, and consigned to their own order.

M. Frigast is a provision merchant at Copenhagen, and claims the goods under purchase through Armour & Co., of Copenhagen, on November 19 for the purpose of his business. He produced satisfactory documents, and I accept his account of the transaction as a real and *bona fide* transaction of purchase, and find he had become the owner of the goods, and that he purchased them to be used in his own business.

#### THE KORSOR MARGARINEFABRIK. A/S.

This firm claims one lot of thirty tierces of oleo stock laden on the *Fridland*, and another lot of thirty tierces of oleo oil laden on the *Kim*.

The shippers were Morris & Co., to their own order at Christiania. They themselves also claim the first lot.

The claimants say the goods were first bought by Erik Valeur, at an agreed price c.i.f. Copenhagen, and that they in turn bought from Valeur. They do not say when they bought, what the price was, or that any payment has been made. Valeur himself does not say he purchased the goods and re-sold them, but that he sold as agent for Morris & Co. A declaration of the claimants of March 19, 1915, that the goods would be consumed in Denmark, states that they were purchased from Morris & Co. through Erik Valeur. The evidence in support of the claim is quite unsatisfactory, and I find the claim has not been established.

The result is that the goods on the *Fridland*, which are also claimed by Morris & Co., must be treated as goods of Morris & Co. unsold, and the goods on the *Kim* as goods unclaimed by any person entitled as owner.

THE MARGARINEFABRIK DANIA.

This is a small claim to 9,004 lb. of lard on the *Fridland*, shipped by Morris & Co., and consigned to their own order at Christiania. The goods are also claimed by Morris & Co. themselves.

The case is, to all intents, identical with the Korsor claim, just dealt with, except that in this case Valeur states he bought them first on his own account and sold them on the same day. They were invoiced after the seizure. I find that the claim has not been established.

C. BUNCHS, FED.

The claimants are a Danish company. The claim is to a parcel of beef tongues (3,371 lb.), shipped on the *Fridland* by Hammond & Co., consigned to their own order, naming Christensen & Thøgersen as the "parties to be notified."

The company say they bought the goods from Christensen & Thøgersen. They produced the bill of lading and priced invoice from Christensen & Thøgersen, and it is sworn they took up the documents. The invoice was sent two days after the seizure. Whether when it was sent the seizure was known does not appear.

On the whole I have come to the conclusion that this is a *bona fide* claim to goods bought to be dealt with in Denmark, and the claim is therefore allowed.

ERIK VALEUR.

This is a claim to 106,155 lb. of oleo stock laden on the *Kim*.

The shipment was by Morris & Co. to their own order at Copenhagen, the parties to be notified being Morris Packing Co., of Christiania. Mr. Valeur was the representative of Morris & Co. at Copenhagen. He said his agency comprehended Denmark only. He alleges that certain of the consignments by Morris (many of which have already been referred to) were sent to him for sale as agent in Denmark, and that if he wished to sell goods to Germany, or German buyers,

he would have to buy them for his own account. The goods he now claims he says he bought on his own account, and I suppose they were therefore goods he intended to send to Germany. I am not satisfied that they were. They were said to have been invoiced to him some days after the capture of the last of the first three vessels.

I find that he has no ground whatever for his allegation that he was the owner of the goods.

CHRISTIAN LOEHR.

This claim is for 41,952 lb. of lard, alleged to have been bought from the Provision Import Co.

This parcel was shipped on the *Alfred Nobel*, and consigned by Rumsey & Co. to their own order, the Provision Import Co. being the parties to be notified. In dealing with the direct claim of the latter I mentioned that certain goods shipped for them had been re-sold. Mr. Loehr is a Dane, and is the British Vice-Consul in Denmark. He produced his documents, and I see no reason to doubt the *bona fides* or the reality of his purchase as one made for the purposes of his business in Denmark.

J. ULLMANN & Co.

The subject-matter of this claim consists of certain rubber of various kinds. 347 cases (133,209 lb.) were shipped on the *Fridland*, and 218 cases (44,428 lb.) on the *Kim*.

The consignors were Edward Maurer & Co., and the consignees "J. Ullmann & Co., Copenhagen."

Rubber was declared conditional contraband on September 21, and absolute contraband on October 29, 1914. At the time of the shipment on the *Fridland*, therefore, rubber was conditional contraband, and at the time of shipment on the *Kim* it was absolute contraband. Exportation of rubber of this kind from Denmark was prohibited on October 22, before either of the shipments.

Jacques Ullmann had, up to the time of the war, carried on business as a merchant in rubber and other articles at Hamburg. It was stated for the Crown that he was a German, but this was a mistake, as it was established that he was born a Swiss and had remained a Swiss subject. After the war he gave up his Hamburg business and began trading in Denmark. He, with his wife, formed a Danish company, "J. Ullmann & Co.," on October 24, 1914.

The transactions relating to the goods claimed were attacked by the Crown on the ground that the rubber was falsely described in the ship's papers as "gum," with the object of misleading, and on the ground that the *Fridland* shipment was confiscable as conditional contraband, because it was destined for the enemy country and for the use of the enemy Government; and the *Kim* shipment as absolute contraband on the ground of destination for the enemy country.

The goods were invoiced as rubber. Much evidence was given on both sides upon the question whether "gum" was an accurate or a false description of the goods. After weighing the evidence I have come to the conclusion that it was not an accurate commercial description, and that its use in the manifest instead of the appropriate commercial description of "rubber," or various qualities of rubber by their commercial names, was adopted in order to avoid the inconvenience or difficulties which would result from a search and possible capture.

Any concealment or misdescription, or device calculated and intended by neutrals to deceive and to hamper belligerents in their undoubted right of search for contraband, will, while I sit in this Court, weigh heavily against those adopting such courses when any presumptions or inferences have to be considered. Neutrals are expected to conduct their neutral trade during the war not only without having recourse to fraud or false papers, but with candour and straightforwardness. As has been said by the American Supreme Court, "Belligerents are entitled to require of neutrals a frank and *bona fide* conduct." It will not be found against their interest to pursue such conduct.

But in investigating attempts to mislead by misdescription or otherwise care must be taken to ascertain who have taken part in such attempts, and to what extent. In the present case I find upon the facts that the misdescription of the rubber as "gum" in the manifest was due in the main to Gans & Co.—the charterers of the vessel. Copies of the invoices with the correct description of rubber were given to Gans & Co. for the purpose of the manifest which was to be made out by them. Maurer & Co. no doubt acquiesced in this, because otherwise they would probably have lost the benefit of the freight contract which they had made early in October.

But I do not find that the claimants, the consignees, ever suggested or took any part in this. I do not find that they were aware of the description used until after the *Fridland* sailed. There was read against them a passage in a cablegram of October 31: "Expect you informed Bruno (the insurer) everything shipped as gum." The explanation of Ullmann, that this was because of a cablegram he received on October 28, is, I think, sufficient. Similarly I do not find that they were responsible for the misdescription of their cargo on the *Kim*.

I have examined the commercial documents, and considered very carefully the cablegrams set out in the exhibit of the Procurator-General, and the letters and cablegrams exhibited to Ullmann's second affidavit; and, even if they are approached in an attitude of suspicion created by some of the surrounding circumstances, I cannot arrive at the inference that the rubber was on its way to an enemy destination when it was seized; on the contrary, my conclusion from the evidence is that the sale to Ullmann, and the purchase and payment by him, were honest business transactions, and that he intended to add the rubber to his stock in his Denmark business, and to dispose of it in Scandinavia in the very profitable market described in his letters, which was created greatly by the stoppage to Scandinavia of all exports of rubber from or through Germany.

A very full and strict undertaking was given on the part of Ullmann & Co. in the course of these proceedings, and that must be adhered to.

W. T. BAIRD.

This relates to thirty-nine cases (29,771 lb.) of rubber shipped on the *Kim* on November 11 (about a fortnight after rubber was declared absolute contraband) by Baird, and consigned to Fritsch.

It stands upon a different footing from the last claim, as the claimant is the shipper.

There are three people concerned: Baird and Frankfurter, in America, and Fritsch, at Landskrona in Sweden. Fritsch was the German Vice-Consul at Sweden, and a forwarding agent. Baird claims as the owner. The transaction is not made as clear as it could and should have been. Counsel at the hearing stated it thus: "Mr. Baird sold these 39 cases of rubber to Mr. Frankfurter, who was also a rubber broker in New York, and he in turn sold it to Mr. Fritsch."

The claimant Baird deposed that the contract for the sale of the said goods was made between Frankfurter and the Rubber Trading Co., of which Baird was president; and that at the time of such sale he was requested by Frankfurter to make the shipment to W. Fritsch, who, he says, "was the principal for whom Frankfurter was acting." Frankfurter exhibits an order which he received from Fritsch. Pursuant to this order (according to his affidavit), he entered into a contract with Baird "for the purchase of the rubber."

No contract or invoice has been produced; the only documents placed before the Court are the letter from Fritsch to Frankfurter and a copy of the bill of lading. Two bills of lading were given. Both of these were sent to Fritsch, according to Baird's statement. He does not say by whom they were sent. Whether Fritsch dealt with them, or what has become of them, the Court was not informed. Baird does not say that any right to dispose of the goods was reserved on the sale to Frankfurter, or to Fritsch, or when the two original bills of lading were sent. Frankfurter throws no light upon this. And Fritsch has not given any evidence or made any deposition.

I am not satisfied that Baird has made out his claim to be owner of the goods, or that any property remained in him after the shipment.

There are, moreover, some other matters to which I must advert in connection with the claim. As to the description of the rubber as "gum," he gave no explanation in his affidavit, but he allowed it to be understood as having been done in the ordinary course of business, for all he says about it is, "I have been engaged in buying and selling rubber for forty years in the city of New York, and I have always understood the terms 'gum' and 'rubber' to be interchangeable terms in the trade, and have frequently known of rubber being described as 'gum.'" In a letter of January 28 he wrote that he could not give any instance of crude rubber having been shipped under the name of "gum."

Later on, the Rubber Club of New York, of which he was a member, appears to have asked Mr. Baird to give them an explanation of the transaction. His answer took the form of a statement made and certified before a notary public on March 24, 1915. There he said the contract was entered into

on October 29, 1914, with Frankfurter, and the goods were sold to him. Fritsch, of Landskrona, is not mentioned. Frankfurter is said to have given assurance that the rubber was for *Danish* consumption. Fritsch was a merchant in Sweden, and that is not the assurance he is said to have given. As to the way in which the rubber was described, he said that the instruction to his shipping clerk to ship it as "gum" was given by Frankfurter, and that he had since been told by Frankfurter that the Gans Line suggested that denomination. Frankfurter does not deal with any of this in his affidavit, made two months later. Baird was therefore a party to this misleading description.

Taking the whole circumstances into consideration, I am justified in drawing the inference that the rubber was on its way to enemy territory through Fritsch, the German Consul; and even if the claimant had made out his claim to be the owner, I find that the rubber was confiscable as absolute contraband.

MARCUS & Co.

This claim refers to ninety-nine bales of hides (18,968 lb.) shipped on the *Kim* on November 11. Hides were declared conditional contraband on September 21, 1914.

The consignors were Amsinck & Co., of New York, and the consignees Marcus & Co., of Copenhagen. The latter are hide merchants, dealing largely with Hamburg.

The claim alleges that the goods were purchased from Goldtree Liebes & Co., of Santa Ana, El Salvador, on terms c.i.f. Copenhagen, cash to be paid on receipt of goods. It was also alleged that the goods had been paid for by the claimants. No proof of payment was given, and it would be strange if the goods were paid for before seizure, when payment was only due on receipt of the goods. Goldtree Liebes & Co. were also merchants at Hamburg. The goods were insured by Hamburg offices. On reference to the exhibit set out in the Procurator-General's affidavit, it will be seen that the claimants were a firm having active dealings with Hamburg after the outbreak of war.

Amsinck & Co., the consignors, were shewn to have sent, under cover to a bank in Christiania, a lot of letters to be sent on to Germany, addressed to various people in Hamburg and Berlin, which were to have been re-posted as if they had been

sent from Christiania. Among such letters, which were intercepted, was one to Goldtree Liebes & Co., of Hamburg, of June 5, 1915, relating to this very parcel of hides, in which they express the hope that the goods have arrived, and refer to Goldtree's "friends in Copenhagen," meaning, without doubt, Marcus & Co., the claimants. No evidence was given as to what was done with the bill of lading.

As the goods were consigned c.i.f. to Copenhagen, and were to be paid for on receipt of the goods, and as the goods were never received by the consignees, and no satisfactory evidence was given of the alleged payment, I am not satisfied that the goods ever were the property of the claimants as alleged.

Besides, the proper inference from such evidence as was adduced is, in my opinion, that Marcus & Co. in Copenhagen were merely intermediaries between Goldtree Liebes & Co., Santa Ana, and Goldtree Liebes & Co., of Hamburg, to whom the goods were really destined at the time of seizure.

#### THE GUARANTY TRUST CO. OF NEW YORK.

These are the last claims I have to deal with. They relate to wheat and flour on the *Alfred Nobel*, the *Bjornstjerne Bjornson*, and the *Fridland*.

The facts in these cases were not sufficiently placed before the Court, and there was no argument upon them on behalf of the Crown. They must be further dealt with by the Crown and the claimants before the Court can dispose of them.

I must accordingly adjourn them for further argument.

With regard to the general character of the cargoes, evidence was given by persons of experience that all the food-stuffs were suitable for the use of troops in the field; that some—for example, the smoked meat or smoked bacon—were similar in kind, wrapping, and packing to what was supplied in large quantities to the British troops, and were not ordinarily supplied for civilian use; that others—for example, canned or boiled beef in tins—were of the same brand and class as had been offered by Armour & Co. for the use of the British forces in the field; and that the packages sent by these ships could only have been made up for the use of troops in the field. As against this, there was evidence that goods of the same class had been ordinarily supplied to and for civilians.



As to the lard, proof was given that glycerin (which is in great demand for the manufacture of nitro-glycerin for high explosives) is readily obtainable from lard. Although this use is possible, there was no evidence before me that any lard had been so used in Germany, and I am of opinion that the lard comprised ought to be treated upon the footing of foodstuffs only. It is largely used in German army rations.

As to the fat backs (of which large quantities were shipped) there was also proof that they could be used for the production of glycerin. Mr. Perkin, in his affidavit in answer to that of Mr. George Stubbs, of the British Government Laboratory (which dealt with lard and fat backs as materials out of which glycerin was producible), confines his observations to lard, and passes by entirely what had been deposed as to fat backs. In fact, no evidence as against that of Mr. Stubbs was offered for the shippers of fat backs. Mr. Nuttall, a deponent for one of them, Sulzberger & Sons Co., says the fat backs shipped by them were not in a condition which was suitable for eating. But he may have meant only that they required further treatment before they become edible. There was no market for these fat backs in Denmark. The Procurator-General deposed, as a result of enquiries, that the Germans were very anxious to obtain fat backs merely for the glycerin they contain. In these circumstances it is not by any means clear that fat backs should be regarded merely as foodstuffs in these cases, and in the absence of evidence to the contrary it is fair to treat them as materials which might either be required as food or for the production of glycerin.

The convenience of Copenhagen for transporting goods to Germany need hardly be mentioned. It is in evidence that the chief trade between Copenhagen and Germany since the war was through Lübeck, Stettin, and Hamburg. The sea-borne trade of Lübeck has increased very largely since the war. It was also sworn in evidence that Lübeck was a German naval base. Stettin is a garrison town, and is the headquarters of army corps. It has also shipbuilding yards where warships are constructed and repaired. It is Berlin's nearest seaport. It will be remembered that one of the big shipping companies asked a Danish firm to become nominal consignees for goods destined for Stettin. Hamburg and Altona had ceased to be the commercial ports dealing with commerce coming through

the North Sea. They were headquarters of various regiments. Copenhagen is also a convenient port for communication with the German naval arsenal and fortress of Kiel and its canal, and for all places reached through the canal.

These ports may properly be regarded, in my opinion, as bases of supply for the enemy, and the cargoes destined for them might on that short ground be condemned as prize. But I prefer, especially as no particular cargo can definitely be said to be going to a particular port, to deal with the cases upon broader grounds.

Before stating the inferences and conclusions of fact, it will be convenient to investigate and ascertain the legal principles which are to be applied according to international law, in view of the state of things as they were in the year 1914.

While the guiding principles of the law must be followed, it is a truism to say that international law, in order to be adequate as well as just, must have regard to the circumstances of the times, including "the circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it"—*THE JONGE MARGARETHA* (1 C. Rob. 189; 1 Eng. P.C. 100); see also *Chancellor Kent's Commentaries*, p. 139.

Two important doctrines familiar to international law come prominently forward for consideration. The one is embodied in the rule as to "continuous voyage" or "continuous transportation"; the other relates to the ultimate hostile destination of conditional and absolute contraband respectively.

The doctrine of "continuous voyage" was first applied by the English Prize Courts to unlawful trading. There is no reported case in our Courts where the doctrine is applied in terms to the carriage of contraband. But it was so applied and extended by the United States Courts against this country in the time of the American Civil War, and its application was acceded to by the British Government of the day, and was, moreover, acted upon by the International Commission which sat under the treaty between this country and America, made at Washington on May 8, 1871, when the commission, composed of an Italian, an American, and a British delegate, unanimously disallowed the claims in *THE PETERHOFF* (5 Wall. 28), which was the leading case upon the subject of continuous transportation in relation to contraband goods. (The other well-

known American cases—for example, *THE STEPHEN HART* (Blatch. Pr. Cas. 387), *THE BERMUDA* (3 Wall. 514), and *THE SPRINGBOK* (5 Wall. 1)—considered and applied the doctrine in relation to attempted breaches of the blockade.)

I am not going through the history of it, but the doctrine was asserted by Lord Salisbury at the time of the South African War with reference to German vessels carrying goods to Delagoa Bay, and as he was dealing with Germany he fortified himself by referring to the view of Bluntschli as the true view, as follows: "If the ships or goods are sent to the destination of a neutral port, only the better to come to the aid of the enemy, there will be contraband of war, and confiscation will be justified."

It is essential to appreciate that the foundation of the law of contraband, and the reason for the doctrine of continuous voyage which has been grafted into it, is the right of a belligerent to prevent certain goods from reaching the country of the enemy for his military use. Neutral traders, in their own interests, set limits to the exercise of this right as far as they can. These conflicting interests of neutrals and belligerents are the causes of the contests which have taken place upon the subject of contraband and continuous voyages.

A compromise was attempted by the London Conference in the unratified Declaration of London. The doctrine of continuous voyage or continuous transportation was conceded to the full by the Conference in the case of absolute contraband, and it was expressly declared that "it is immaterial whether the carriage of the goods is direct, or entails transshipment, or a subsequent transport by land." As to conditional contraband, the attempted compromise was that the doctrine was excluded in the case of conditional contraband, except where the enemy country had no seaboard.

As is usual in compromises, there seems to be an absence of logical reason for the exclusion. If it is right that a belligerent should be permitted to capture absolute contraband proceeding by various voyages or transport with an ultimate destination for the enemy territory, why should he not be allowed to capture goods which, though not absolutely contraband, become contraband by reason of a further destination to the enemy Government or its armed forces? And with the facilities of transportation by sea and by land which now exist

the right of a belligerent to capture conditional contraband would be of a very shadowy value if a mere consignment to a neutral port were sufficient to protect the goods. It appears also to be obvious that in these days of easy transit, if the doctrine of continuous voyage or continuous transportation is to hold at all, it must cover not only voyages from port to port at sea, but also transport by land until the real, as distinguished from the merely ostensible, destination of the goods is reached.

In connection with this subject note may be taken of the communication of January 20, 1915, from Mr. Bryan, as Secretary of State for the United States Government, to Mr. Stone, of the Foreign Relations Committee of the Senate. It is, indeed, a State document. In it the Secretary of State, dealing with absolute and conditional contraband, puts on record the following as the views of the United States Government:

"The rights and interests of belligerents and neutrals are opposed in respect to contraband articles and trade . . . The record of the United States in the past is not free from criticism. When neutral, this Government has stood for a restricted list of absolute and conditional contraband. As a belligerent, we have contended for a liberal list, according to our conception of the necessities of the case.

"The United States has made earnest representations to Great Britain in regard to the seizure and detention of all American ships or cargoes *bona fide* destined to neutral ports . . . It will be recalled, however, that American Courts have established various rules bearing on these matters. The rule of 'continuous voyage' has been not only asserted by American tribunals, but extended by them. They have exercised the right to determine from the circumstances whether the ostensible was the real destination. They have held that the shipment of articles of contraband to a neutral port 'To order' [this was of course before the Order in Council of October 29], from which, as a matter of fact, cargoes had been transhipped to the enemy, is corroborative evidence that the cargo is really destined to the enemy instead of to the neutral port of delivery. It is thus seen that some of the doctrines which appear to bear harshly upon neutrals at the present time are analogous to or out-growths from policies adopted by the United States when

it was a belligerent. The Government, therefore, cannot consistently protest against the application of rules which it has followed in the past, unless they have not been practised as heretofore. . . . The fact that the commerce of the United States is interrupted by Great Britain is consequent upon the superiority of her Navy on the high seas. History shows that whenever a country has possessed the superiority our trade has been interrupted, and that few articles essential to the prosecution of the war have been allowed to reach its enemy from this country."

It is not necessary to dilate further upon the history of the doctrine in question.

I have no hesitation in pronouncing that, in my view, the doctrine of continuous voyage or transportation, both in relation to carriage by sea and to carriage by over land, had become part of the law of nations at the commencement of the present war, in accordance with the principles of recognised legal decisions, and with the view of the great body of modern jurists, and also with the practice of nations in recent maritime warfare.

The result is that the Court is not restricted in its vision to the primary consignments of the goods in these cases to the neutral port of Copenhagen, but is entitled and bound to take a more extended outlook in order to ascertain whether this neutral destination was merely ostensible, and if so, what the real ultimate destination was.

As to the real destination of a cargo, one of the chief tests is whether it was consigned to the neutral port, to be there delivered, for the purpose of being imported into the common stock of the country. This test was applied over a century ago by Sir William Grant in the Court of Appeal in Prize cases in the case of *THE WILLIAM* (5 C. Rob. 385; 1 Eng. P.C. 505). It was adopted by the United States Supreme Court in the unanimous judgment in *THE BERMUDA* (3 Wall. 514), where Chief Justice Chase, in delivering the judgment, said, "Neutrals may convey in neutral ships, from one neutral port to another, any goods, whether contraband of war or not, if intended for actual delivery at the port of destination, and to become part of the common stock of the country or of the port."

Another circumstance which has been regarded as important in determining the question of real or ostensible destination at

the neutral port was the consignment "to order or assigns" without naming any consignee. In the celebrated case of *THE SPRINGBOK* (5 Wall. 1) the Supreme Court of the United States acted upon inferences as to destination (in the case of blockade) on this very ground. The part of the judgment dealing with the matter is as follows: "That some other destination than Nassau was intended may be inferred from the fact that the consignment, shown by the bills of lading and the manifest, was to order or assigns. Under the circumstances of this trade, . . . such a consignment must be taken as a negation that any such sale was intended to be made there; . . . for had such sale been intended it is most likely that the goods would have been consigned for that purpose to some established house named in the bills of lading" (pp. 25, 26).

The same circumstance was also similarly dealt with in *THE BERMUDA* (3 Wall. 514) and in *THE PETERHOFF* (see *Blatch. Pr. Cas.* 463, at p. 540, and 5 Wall. 28).

I am not unmindful of the argument that consignment "to order" is common in these days. But a similar argument was used in *THE SPRINGBOK* (5 Wall. 1), supported by the testimony of some of the principal brokers in London to the effect that a consignment "to order or assign" was the usual and regular form of consignment to an agent for sale at such a port as Nassau. The British Government was petitioned to intervene for the shippers, but upon this point the British Foreign Office said that "no doubt the form was usual in the time of peace, but that a practice which might be perfectly regular in time of peace under the municipal regulations of a particular State would not always satisfy the law of nations in time of war, more particularly when the voyage might expose the ship to the visit of belligerent cruisers"; and added that, "having regard to the very doubtful character of all trade ostensibly carried on at Nassau during the war in the United States, and to many other circumstances of suspicion before the Court, Her Majesty's Government are not disposed to consider the argument of the Court upon this point as otherwise than tenable."

The argument still remains good, that if shippers after the outbreak of war consign goods of the nature of contraband to their own order, without naming a consignee, it may be a circumstance of suspicion in considering the question whether the goods were really intended for the neutral destination, and

to become part of the common stock of the neutral country, or whether they had another ultimate destination. Of course it is not conclusive. The suspicion arising from this form of consignment during war might be dispelled by evidence produced by the shippers. It may be here observed that some point was made that in many of the consignments the bills of lading were not made out "to order" *simpliciter*, but to branches or agents of the shippers. That circumstance does not, in my opinion, make any material difference.

Other matters relating to destination will be discussed upon the second branch of the case—namely, whether the goods were destined for Government or military use. Wherever destination comes in question, certainty as to it is seldom possible in such cases as these; "highly probable destination" is enough in the absence of satisfactory evidence for the shippers—see *per* Lord Stowell in *THE JONGE MARGARETHA* (1 C. Rob., at p. 194; 1 Eng. P.C., at p. 103).

Upon this branch of the case, for reasons which have been given when dealing with the consignments generally and when stating the circumstances with respect to each claim, I have no hesitation in stating my conclusion that the cargoes (other than the small portions acquired by persons in Scandinavia, whose claims are allowed), were not destined for consumption or use in Denmark or intended to be incorporated into the general stock of that country by sale or otherwise; that Copenhagen was not the real *bona fide* place of delivery, but that the cargoes were on their way at the time of capture to German territory as their actual and real destination.

The second branch of the case raises the question whether the goods, which I have decided were on their way to German territory, were destined further for the use of the German Government, or departments, or for military use by the troops, or other persons actually engaged in warlike operations, or should be presumed to be so destined in the circumstances.

As a preliminary it becomes necessary to consider the two Orders in Council of August 20 and October 29, 1914.

It was contended for the claimants that, before the seizure of the cargoes on the first three vessels, and while they were still on their respective voyages, the Order in Council of August 20 (even if it was binding on the Court) had been rendered inoperative

by the repeal contained in the Order of October 29. It was further contended that the two Orders in Council purporting to give effect, with certain additions and modifications, to the unratified Declaration of London had no binding effect upon this Court, and ought to be disregarded.

As to the first of these two contentions, no doubt if the first Order had affected the substantive rights of the neutral—for example, if it had declared an article as absolute contraband which by the repealing Order had been removed from the list of contraband before capture, it could not be said that the Order had remained operative so as to justify the seizure of the article. But in reality the only change (material to these cases) which the Order purported to make was in the nature of alteration of practice as to evidence—namely, by adding certain presumptions to those contained in article 34 of the Declaration of London—and all these presumptions, whether set up in the interest of the captor or against him, are rebuttable (see M. Renault's Report on the Declaration). The Order had proclaimed to the neutral owners of the cargoes before the voyages commenced how in practice, as matter of evidence and proof, cargoes seized would be dealt with, and it might fairly be argued that they could not complain if their cases were treated in accordance with the Order. But it is not necessary for me to pronounce any decision upon the point. I will, for the purpose of this case, assume that the Order of August 20 had ceased to have any effect upon the promulgation of the subsequent Order. The result is that cases relating to the *Alfred Nobel*, *Bjornstjerne Bjornson*, and the *Fridland* must be decided in accordance with the rules of international law.

But the Order of October 29 applies to all the cargoes on the *Kim*.

As to the contention that the Order is not binding on this Court, I expressed my views on the general question of the binding character of Orders in Council upon the Prize Court in the case of *THE ZAMORA* (*ante*, p. 309). I do not wish to detract anything from what I then said, nor do I deem it necessary at present to add anything as to the general principles. But as to this Order, so far as it affects questions arising in these proceedings, it is right to point out that no provision in it can possibly be said to be in violation of any rule or principle of international law. It is true that in a matter of real substance



it alters the proposed compromise incorporated in article 35 of the Declaration of London, whereby, if the Declaration had been ratified, the doctrine of continuous voyage would have been excluded for conditional contraband. The provision in article 35 was described by Sir Robert Finlay (counsel for several of the claimants) as "An innovation in international law as hitherto recognised in the United States and by Great Britain and other States, introducing an innovation of the first importance by excluding the doctrine of continuous voyage in the case of conditional contraband."

What the Order in Council did, therefore, was to prevent the innovation. In this regard it therefore proceeded not in violation of, but upon the basis of, the existing international law upon the subject.

It may be well to note, and to record, that at the London Conference which produced the Declaration, all the allied Powers engaged in this war, and also the United States, had been in favour of continuing to apply the doctrine of continuous voyage or continuous transportation to conditional as well as to absolute contraband, a doctrine which, as we have seen, was nurtured and specially favoured by the Courts of the United States. As to the modifications regarding presumptions and onus of proof, as, for instance, where goods are consigned "to order" without naming a consignee, these are matters really affecting rules of evidence and methods of proof in this Court, and I fail to see how it is possible to contend that they are violations of any rule of international law.

The effect of the Order in Council is that, in addition to the presumptions laid down in article 34 of the "Declaration of London," a presumption of enemy destination, as defined by article 33, shall be presumed to exist if the goods are consigned to or for an agent of the enemy State, or to a person in the enemy territory, or if they are consigned "to order," or if the ship's papers do not shew who the consignee is; but in the latter cases the owners may, if they are able, prove that the destination is innocent. All the goods claimed by the shippers on the *Kim* were consigned to their own order or to the order of their agents (which is the same thing), and not to any independent consignee, and they have all entirely failed to discharge the onus which lies upon them to prove that their destination was innocent. There was some suggestion that

liability to capture in the Declaration of London and Order in Council did not mean liability to confiscation or condemnation. On reference to the various provisions as to absolute and conditional contraband it is clear that it is used in that sense.

I am of opinion that under the Order in Council the goods claimed by all the shippers on the *Kim* were confiscable as lawful prize.

I now proceed to consider the confiscability of the cargoes on all the four vessels, apart entirely from the operation of the Order in Council upon the *Kim* cargoes.

Having decided that the cargoes, though ostensibly destined for Copenhagen, were in reality destined for Germany, the question remains whether their real ultimate destination was for the use of the German Government or its naval or military forces. If the goods were destined for Germany, what are the facts and the law bearing upon the question whether they had the further hostile destination for the German Government for military use?

In the first place, as has already been pointed out, they were goods adapted for such use; and, further, in part adapted for immediate warlike purposes in the sense that some of them could be employed for the production of explosives. They were destined, too, for some of the nearest German ports, like Hamburg, Lübeck, and Stettin, where some of the forces were quartered, and whose connections with the operations of war has been stated. It is by no means necessary that the Court should be able to fix the exact port—see *THE DOLPHIN* (7 Fed. Cas. 868), *THE PEARL* (19 Fed. Cas. 54; 5 Wall. 574), and *THE PETERHOFF* (5 Wall. 28, at p. 59). Regard must also be had to the state of things in Germany during this war in relation to the military forces and to the civil population, and to the method described in evidence which was adopted by the Government in order to procure supplies for the forces.

The general situation was described by the British Foreign Secretary in his Note to the American Government on February 10, 1915, as follows:

“The reason for drawing a distinction between foodstuffs intended for the civil population, and those for the armed forces or enemy Government disappears when the distinction between the civil population, and the armed forces itself disappears. In

any country in which there exists such a tremendous organisation for war as now obtains in Germany, there is no clear division between those whom the Government is responsible for feeding, and those whom it is not. Experience shows that the power to requisition will be used to the fullest extent in order to make sure that the wants of the military are supplied, and however much goods may be imported for civil use it is by the military that they will be consumed if military exigencies require it, especially now that the German Government have taken control of all the foodstuffs in the country."—I am not saying that the last sentence is applicable to the circumstances of this case.—"In the peculiar circumstances of the present struggle where the forces of the enemy comprise so large a proportion of the population, and where there is so little evidence of shipments on private as distinguished from Government account, it is most reasonable that the burden of proof should rest upon claimants."

It was given in evidence that about ten millions of men were either serving in the German army or dependent upon or under the control of the military authorities of the German Government out of a population of between sixty-five and seventy millions of men, women, and children. Of the food required for the population it would not be extravagant to estimate that at least one-fourth would be consumed by these ten million adults. Apart altogether from the special adaptability of these cargoes for the armed forces, and the highly probable inference that they were destined for the forces, even assuming that they were indiscriminately distributed between the military and civilian population, a very large proportion would necessarily be used by the military forces.

So much as to the probable ultimate destination in fact of the cargoes.

Now as to the question of the proof of intention on the part of the shippers of the cargoes.

It was argued that the Crown, as captors, ought to shew that there was an original intention by the shippers to supply the goods to the enemy Government or the armed forces at the inception of the voyage as one complete commercial transaction, evidenced by a contract of sale or something equivalent to it. It is obvious, from a consideration of the whole scheme of conduct of the shippers, that if they had expressly arranged to

consign the cargoes to the German Government for the armed forces this would have been done in such a way as to make it as difficult as possible for belligerents to detect it. If the captors had to prove such an arrangement affirmatively and absolutely in order to justify capture and condemnation, the rights of belligerents to stop articles of conditional contraband from reaching the hostile destination would become nugatory. It is not a crime to dispatch contraband to belligerents. It can be quite legitimately sent subject to the risk of capture. But the argument proceeded as if it were essential for the captors to prove the intention as strictly as would be necessary in a criminal trial, and as if all the shippers need do was to be silent, to offer no explanation, and to adopt the attitude towards the Crown, "Prove our hostile intention if you can."

In the first place, it may be observed that it is not necessary that an intention at the commencement of the voyage should be established by the captors either absolutely or by inference. In *THE BERMUDA* (3 Wall. 514) the Chief Justice of the Supreme Court of the United States, in referring to the decision of Sir William Grant in *THE WILLIAM* (5 C. Rob. 385; 1 Eng. P.C. 505), said, "If there be an intention, either formed at the time of the original shipment or afterwards, to send the goods forward to an unlawful destination, the continuity of the voyage will not be broken, as to the cargo, by any transactions at the intermediate port" (3 Wall., at p. 554).

It is, no doubt, incumbent upon the captors in the first instance to prove facts from which a reasonable inference of hostile destination can be drawn, subject to rebuttal by the claimants. Lord Granville, as Foreign Secretary in 1885, in a Note to M. Waddington (the French ambassador) which had reference to the question of rice being declared contraband by the French Government in relation to China, said, "There must be circumstances relative to any particular cargo, or its destination, to displace the presumption that articles of food are intended for the ordinary use of life, and to show, *prima facie* at all events, that they are destined for military use, before they could be treated as contraband."

And Lord Lansdowne, as Foreign Secretary in 1904, in a note to the British ambassador at St. Petersburg, stated the British view thus: "The true test appears to be whether there

are circumstances relating to any particular cargo to show that it is destined for military or naval use."

These statements, so qualified, it will be noted, were made when this country was making representations against the action of foreign Governments concerning conditional contraband. Therefore, they were put as high, I assume, as it was thought they properly could be put.

So far as it is necessary to establish intention on the part of the shippers, it appears to me to be beyond question that it can be shewn by inferences from surrounding circumstances relating to the shipment of and dealings with the goods. Cargoes are inanimate things, and they must be sent on their way by persons. If that is all that was meant by counsel for the claimants when they argued that "intention" must be proved, their contention may be conceded. But it need not be an "intention" proved strictly to have existed at the beginning of the voyage, or as an obligation under a definite commercial bargain. If at the time of the seizure the goods were in fact on their way to the enemy Government or its forces as their real ultimate destination by the action of the shippers, whenever their project was conceived, or however it was to be carried out—if, in truth, it is reasonably certain that the shippers must have known that that was the real ultimate destination of the goods (apart, of course, from any genuine sale to be made at some intermediate place)—the belligerent had a right to stop the goods on their way, and to seize them as confiscable goods.

In the circumstances of these cases, especially in view of the opportunity given to the claimants, who possess the best and fullest knowledge of the facts, to answer the cases made against them, any fair tribunal like a jury, or an arbitrator, whose duty it was to judge facts, not only might, but almost certainly would, come to the conclusion that at the time of the seizure the goods which remained the property of the shippers were, if not as to the whole, at any rate as to a substantial proportion of them, at the time of seizure on their way to the enemy for its hostile uses. The facts in these cases, in my opinion, more than amply satisfy the "highly probable destination" spoken of by Lord Stowell.

Before I conclude I will make reference to an opinion expressed towards the end of last year by a body of men, eminent as students and expositors of international law in

America, in the editorial comment in the *American Journal of International Law*, to which my attention was called by the Law Officers. Amongst them I need only name Mr. Chandler Anderson, Mr. Robert Lansing, Mr. John Bassett Moore, Mr. Theodore Woolsey, and Mr. James Brown Scott. It is as follows: "In a war in which the nation is in arms, where every able-bodied man is under arms and is performing military duty, and where the non-combatant population is organised so as to support the soldiers in the field, it seems likely that belligerents will be inclined to consider destination to the enemy country as sufficient, even in the case of conditional contraband, especially if the Government of the enemy possesses and exercises the right of confiscating or appropriating to naval or military uses the property of its citizens or subjects of service to the armies in the field."

I cite this, not, of course, as any authority, but as shewing how these eminent American jurists acknowledge that international law must have regard to the actual circumstances of the times. I have not in this judgment followed the course thus indicated by them as a likely and reasonable one in the present state of affairs. I have preferred to proceed on the lines of the old recognised authorities.

I wish also to note the opinion recently expressed by the Hamburg Prize Court in the case of *THE MARIA* (*Hanseatische Gerichtszeitung*, April 17, translated in *Lloyd's List*, July 1), decided in April last, where goods consigned from the United States to Irish ports were laden upon a Dutch vessel. I refer to it, not because I look upon it as profitable or helpful (on the contrary, I agree with Sir R. Finlay that it should rather be regarded as a "shocking example"), but because it is not uninteresting as an example of the ease with which a Prize Court in Germany hacks its way through *bona fide* commercial transactions when dealing with foodstuffs carried by neutral vessels. Be it remembered, too, that the Court was dealing with wheat which was shipped from America before the war, and which had also before the war been sold in the ordinary course of business to well-known British merchants, R. & H. Hall, Lim.

The Hamburg Court said: "There is no means of ascertaining with the least certainty what use the wheat would have been put to at the arrival of the vessel in Belfast, and whether the British Government would not have come upon the scene

as purchaser, even at a very high price; and in this connection it must also be borne in mind that the bills of lading were made out *to order*, which greatly facilitated the free disposal of the cargo. That at the time of the conclusion of the contract concerning the acquisition of the wheat on the part of R. & H. Hall, Ltd., the possibility of using the same for war purposes had, perhaps, not been contemplated, does not affect the question what actual use would have been made of the cargo of wheat after the outbreak of war in October, 1914."

For the many reasons which I have given in the course of this judgment, and which do not require recapitulation, or even summary, I have come to the clear conclusion from the facts proved, and the reasonable and, indeed, irresistible inferences from them, that the cargoes claimed by the shippers as belonging to them at the time of seizure were not on their way to Denmark to be incorporated into the common stock of that country by consumption, or *bona fide* sale, or otherwise; but, on the contrary, that they were on their way not only to German territory, but also to the German Government and their forces for naval and military use as their real ultimate destination. To hold the contrary would be to allow one's eyes to be filled by the dust of theories and technicalities, and to be blinded to the realities of the case.

Even if this conclusion were only accurate as to a substantial proportion of the goods, the whole would be affected, because "Contraband articles are said to be of an infectious nature, and they contaminate the whole cargo belonging to the same owners. The innocence of any particular article is not usually admitted to exempt it from the general confiscation"—*Kent's Commentaries* (12th ed., by Mr. Justice Holmes), p. 143. See to the same effect *THE SPRINGBOK* (Blatch. Pr. Cas. 434, at p. 451), and *THE PETERHOFF* (5 Wall. 28, at p. 59).

The Declaration of London (art. 42) is to the same effect, and Mr. Renault's report on it is: "The owner of the contraband is punished in the first place by the condemnation of his contraband property, and in the second by that of the goods, even if innocent, which he may possess on board the same vessel."

It only remains, to conclude these long and troublesome cases, to state the results as applied to each of the claims:

I disallow the claims of Morris & Co., Armour & Co., Hammond & Co. (with Swift & Co.), Sulzberger & Sons Co.,

Pay & Co., Brödr Levy, Elwarth, Buch & Co., Hansen, Pedersen, Henriques & Zoynder, Korsor Fabrik, Dania Fabrik, Valeur, Baird, and Marcus & Co., and pronounce condemnation as prize of the goods comprised in them or of their proceeds if sold.

I allow the claims of Cudahy & Co., the Provision Import Co., Christensen & Thøgersen, Segelcke, Frigast, Bunchs Fed., Loehr, and Ullmann & Co., and order the goods comprised in them or the net proceeds thereof, if sold, to be released to the respective claimants.

General liberty to appeal within six weeks. Security in the sum of 5,000*l.*, to be allocated between the various appellants.

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*Solicitors*—Treasury Solicitor, for Procurator-General; W. A. Crump & Son, for Armour & Co. and Fearon Brown & Co.; Rawle Johnstone & Co., for Morris & Co., Stern & Co., Hammond & Co., and Swift & Co.; Pritchard & Sons, agents for Alsop & Co., Liverpool, for Sulzberger & Co.; Windybank, Samuel & Lawrence, agents for Luga & Williams, Liverpool, for Cudahy Packing Co.; Botterell & Roche, for various Danish consignees, owners of the *Kim*, *Alfred Nobel*, and *Bjornstjerne Bjornson*, and Ullmann & Co.; Parker, Garrett & Co., for Ullmann & Co., in respect of rubber on the *Kim*; Crosley & Burn, for Baird & Co.; Thomas Cooper & Co., for Guaranty Trust Co. and others; Kearsey, Hawes & Wilkinson, for owners of the *Fridland*; Pritchard & Son, agents for Batesons, Warr & Wimshurst, Liverpool, for Fearon, Brown & Co.

[*Reported by E. C. Trehern, Esq., Barrister-at-Law.*

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[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). Sept. 9, 1915.

THE TREDEGAR HALL.

*British Ship—Enemy Cargo Loaded Before War—Seizure—Shipowners' Claims—Extra Freight—Expenses Due to Diversion and Detention—Extra Expenses of Discharge.*

*British shipowners are not entitled to any sum for inconvenience or delay to the ship due to her being diverted or detained for the discharge of enemy cargo on board her, nor*



*for the estimated extra cost of discharge as compared with the cost which would have been incurred at the port of destination.*

*The principles laid down in THE JUNO (ante, p. 151) further explained.*

Shipowners' claim for extra freight and expenses.

In July, 1914, the *Tredegar Hall*, a British steamship owned by the claimants, Edward Nichol & Co., loaded a cargo of maize at San Lorenzo and Ramallo, in the river Plate, and on signing bills of lading was ordered to proceed to Hamburg and Emden. She sailed before the outbreak of war. On August 4 the owners received a telegram from Lloyd's, London, stating that the Admiralty suggested that in the national interests the vessel should be diverted to a port in the United Kingdom, and on August 5, on her arrival off Portland, Lloyd's Signal Station signalled to the master that his original orders were cancelled, and that the vessel was to proceed to the nearest British port. The *Tredegar Hall* accordingly proceeded to Weymouth, where she arrived on the same day. On August 9, in accordance with orders received from the Admiralty, she went into Portland Harbour, and on August 12 orders were received from the Admiralty for her to proceed to Avonmouth. After she had sailed the owners received instructions from the Admiralty to order her to Cork, and on her arrival in Barry Roads these orders were communicated to the master. The vessel then went into Barry Dock, and, having taken in sufficient bunker coal for the passage, she proceeded to Cork, where she arrived on August 16, and subsequently discharged her cargo.

The cargo was condemned as prize, and the Admiralty paid the shipowners the full freight on the cargo due in respect of the carriage from the river Plate to Hamburg and Emden.

The shipowners now claimed 1,400*l.* 4*s.* for freight from Weymouth to Cork, and seven days' detention at Weymouth and Portland 439*l.* 0*s.* 4*d.*—total, 1,839*l.* 4*s.* 4*d.* In the alternative they claimed that the discharge at Cork cost them 16*l.* 14*s.* 8*d.* more than discharge at both Hamburg and Emden would have cost, and they claimed that sum.

*Laing, K.C.*, and *R. A. Wright*, for the Crown.—The full chartered freight has been paid, and the shipowners are not entitled to anything further. Claims for detention are not

recoverable—THE JUNO (*ante*, p. 151). The delay is due to the misfortune of war, and the shipowners must bear the loss. The alternative claim should also be disallowed, for the vessel could not have proceeded to her port of destination, the cargo had to be discharged somewhere, and Cork was a convenient place. Further, it is impossible to estimate the difference in the cost of discharging at a British or a German port in time of war.

*C. R. Dunlop*, for the shipowners.—The case is covered by THE JUNO (*ante*, p. 151), but if the principles there laid down are not applicable they should be enlarged, and a direction given for the guidance of the Registrar to allow a reasonable sum in all the circumstances—see also THE ROUMANIAN (*ante*, p. 75). Apart from freight, reward can be claimed for bringing enemy cargo into a British port—see THE VENUS (Warrants Nos. 220 and 221).<sup>1</sup>

[SIR SAMUEL EVANS (THE PRESIDENT).—That was a personal reward to the master. What did the shipowners do in this case?]

They telegraphed to the master to bring the ship into a British port when she might have gone to a neutral port in Holland or Spain to discharge her cargo, where it would have been sold and the captors would have been deprived of their prize. The shipowners, therefore, should have a reasonable sum over and above the freight for their services.

*Laing, K.C.*, in reply.—If any sum was due for what amounted to “salvage,” then the full freight should not have been allowed. The awards in THE VENUS (Warrants Nos. 220 and 221)<sup>1</sup> were made on the recommendation of the Crown for meritorious service, and no principle was laid down.

(1) The master of the British vessel *Venus*, whilst bound to Hamburg with a cargo shipped at Genoa and other ports, heard that war had broken out between France and England, and put into Plymouth for the safety of his vessel, and also to ascertain the nature of the cargo, which he believed to be French. He communicated his suspicions to the receiver of Admiralty droits at Plymouth, who ordered the cargo to be seized. The ship and part of the cargo were restored, but the remainder of the cargo, proving to be enemy property, was condemned as droits of Admiralty and realised 531*l.* 18*s.* 8*d.* The Crown granted fifty guineas as a reward to the master of the *Venus* in consideration of his conduct in the matter, and 100 guineas to the receiver in consideration of his having seized the ship and cargo at his own risk—see *Prize Droits*, by H. C. Rothery, C.B., Registrar of the High Court of Admiralty 1853-1878 (revised and annotated by E. S. Roscoe), p. 129.

SIR SAMUEL EVANS (THE PRESIDENT).—The only matter which remains for determination in this case is the claim which is made by Messrs. Edward Nichol & Co. to a large sum of money, amounting to 1,839*l.* 4*s.* 4*d.*, over and above the full freight which is due to the *Tredegar Hall* under the charterparty if the goods had been delivered at Hamburg and Emden. There is an alternative claim for a small sum, with which I will deal in a moment.

The vessel was brought into this country by means of a telegram through Lloyd's to the master of the vessel, and certain movements became necessary, in the interests of the cargo and also in the interests of the vessel herself, whereby she finally found herself not at Hamburg or Emden, but at Cork, where the cargo was delivered, and where the ship was set free. There might be some question to be determined in accordance with the principles I laid down in *THE JUNO* (*ante*, p. 151) as to the amount of freight to which this vessel was entitled in these circumstances; but no such question remains open in this particular case, because the Crown (through the Procurator-General) have paid to the shipowners the whole of the freight, so that no reference is necessary at all in order to ascertain the freight in accordance with the principles in *THE JUNO* (*ante*, p. 151). An attempt is now made to get something over and above that freight by way of compensation for delay or inconvenience in taking the vessel from one place to another and landing her cargo ultimately at Cork.

I intended to say in *THE JUNO* (*ante*, p. 151)—and I think I did say—that no sum ought to be allowed to British shipowners in respect of any delay or inconvenience which might occur to a ship as the result of her diversion or detention for the purpose of seizure, and making the unlivery of confiscable enemy cargo. When I referred to the inconvenience or delay in the last paragraph but four of my judgment, I intended to include any inconvenience or delay caused by the detention or diversion of the vessel from her chartered course. That is made clear, I think, in the final paragraph. In this case nothing happened except the delay and inconvenience which was caused by her diversion in consequence of the war. It is a loss, if it be a loss, to the shipowners as a result of the war, and for which, unfortunately, they cannot have any compensation. It is a loss like the losses which have to be submitted to by other citizens

in other capacities and other walks in life, as I have already pointed out in *THE JUNO* (*ante*, p. 163). I think in this case that the owners of the vessel, who have been paid their full freight, have been generously treated. If they had tried to proceed to Hamburg, I do not think it requires a very lively imagination to see what would have happened if the vessel had not been diverted to this country either voluntarily or by the action of His Majesty's cruisers.

With regard to the alternative claim for 16*l.* 14*s.* 8*d.*, that is a claim which the shipowners put forward upon a comparison of estimated charges at Hamburg and Emden with the charges which have been incurred at Cork. It is a small sum, but I am asked to deal with it as a question of principle.

I am referred to what I did in the case of *THE JUNO* (*ante*, p. 151). My impression is, relying upon my memory and upon the way in which I dealt with it in the judgment, that the special items which I said ought to be allowed in that case were not allowed on any principle at all, but because I thought, having regard to all the circumstances, that it might be the generous and proper thing to give the extra costs which were there allowed. But if I am to deal with it as a question of principle, I think it is quite clear (apart from the difficulties of ascertaining any sum of this kind, as has been pointed out by counsel for the Procurator-General—for example, the difficulty of comparing the cost of discharging at Cork during war time and the cost of discharging at Hamburg and at Emden, supposing the vessel had arrived there), that these losses are losses which the shipowner sustains by reason of the war, and which he is not entitled to have brought into account at all in the estimation of the freight, according to the principles which I have laid down.

The claims of Messrs. Edward Nichol & Co. must be disallowed.

[Leave to enter an appeal within one month.]

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*Solicitors*—Treasury Solicitor; Holman, Birdwood & Co.

[*Reported by E. C. Trehern, Esq., Barrister-at-Law.*]

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[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT).

Sept. 23, 24. Oct. 12, 1915.

## THE MANNINGTRY.

*Enemy Cargo—Partnership Property—British Partners in Enemy Firm—Severance of Connection with Enemy Firm—Freight—Voluntary Payment—Bona Fide Payments by Holders of Bills of Lading—Reimbursement.*

Where property belonging to a firm whose house of trade is in an enemy country has been seized as prize, the shares attributable to British partners or quasi-partners domiciled in England will be condemned unless they prove that they took immediate steps on the outbreak of war to sever their connection with the enemy firm.

A voluntary payment of freight by persons for their own purposes in respect of cargo condemned as prize will not entitle them to claim reimbursement from the captors; but when freight has been honestly paid in respect of condemned cargoes, which would have had to bear the burden of the freight if unpaid, the Court may order repayment if, in the circumstances, it is just and equitable.

British bankers, being the holders of bills of lading on cargo carried in a British ship and consigned to a neutral port, innocently paid a portion of the freight in ignorance of the fact that the cargo had already been seized as prize:—Held, that the sum so paid should be reimbursed to the bankers out of the proceeds of sale of the condemned cargo.

Suit for condemnation of cargo.

Claims in respect of freight.

The subject-matter of these claims was a quantity of zinc and lead concentrates shipped before war in the British steamship *Manningtry* for carriage from South Australia to Antwerp. War broke out whilst the vessel was on her voyage, and she was diverted to Brixham, where her cargo was seized as prize.

Claims were entered on behalf of four firms—the Compagnie des Minerais, of Liège; Henry R. Merton & Co., Lim., and

Vivian, Younger & Bond, of London; and the Australian Metal Co., Lim., of London and Melbourne.

Claims were also entered by H. R. Merton & Co., Lim., the Union Bank of Australia, Lim., and the shipowners in respect of freight.

The facts are fully stated in the judgment.

*The Solicitor-General (Sir F. E. Smith, K.C.), Mackinnon, K.C., and R. A. Wright, for the Crown.*

*Maurice Hill, K.C., Leck, K.C., and D. Stephens, for the four claimants in respect of cargo.*

*C. R. Dunlop, for the Union Bank of Australia, Lim.*

*E. W. Brightman, for the shipowners.*

[The arguments on the cargo claims sufficiently appear from the judgment. In addition to the cases there referred to, *THE CLAN GRANT* (*ante*, p. 272), *THE ANTONIA JOHANNA* [1816] (1 Wheaton, 159), *THE ROUMANIAN* (*ante*, p. 75), and *CONTINENTAL TYRE & C. CO. v. DAIMLER CO., LIM.* [1915] (84 L. J. K.B. 926; [1915] 1 K.B. 893), were cited.]

On behalf of the Union Bank of Australia, Lim., it was contended that these claimants, who were pledgees and had abandoned their claim to the goods after the decision in *THE ODESSA* (*ante*, p. 163), were entitled to the repayment of 3,100*l.* paid to the shipowners in respect of freight. The bank were the holders of the bills of lading, and when the *Manningtry* was diverted to Brixham they paid a portion of the freight in ignorance of the fact that the cargo had been seized as prize.

The Crown resisted the claim, not—as in *H. R. Merton & Co.*'s claim in this case and in *THE BILBSTER* (see *post*, p. 507*n.*)—on the ground that the claimants had acted in bad faith, but on the principle that a voluntary payment of freight, in circumstances which had the effect of reducing the liability of the enemy consignees in respect of a debt for which the claimants had a good right of action after the war, was not recoverable, in accordance with the decision in *THE CLAN URQUHART*.<sup>1</sup>

*Cur. adv. vult.*

(1) *THE CLAN URQUHART*. In this case, tried before the President on May 10, 1915, *F. Huth & Co.*, merchants in London, claimed repayment of the sum of 36*l.* 8*s.* 5*d.*, paid by them on September 14, 1914, to the owners of the British steamship *Clan Urquhart* for freight and charges in respect of certain goods shipped before war at Port Sudan for carriage

Oct. 12.—SIR SAMUEL EVANS (THE PRESIDENT).—The claims upon which the Court has now to pronounce judgment relate to two consignments of metal laden in this British vessel—namely, 1,811 tons of zinc concentrates and 1,006 tons of leady concentrates.

They were shipped by the Australian Metal Co., Lim., at Port Pirie (South Australia), before the outbreak of war, and consigned to the order of the shippers or their assigns at Antwerp. The vessel was chartered by the Metallgesellschaft, of Frankfort.

Five commercial bodies or firms come into play in the intricate transactions which have had to be investigated. They are the Metallgesellschaft, a very large German metal company with its head office at Frankfort; Messrs. Henry R. Merton & Co., Lim., of the City of London, a registered British company; the Australian Metal Co., Lim., of London and Melbourne, also a registered British company; Messrs. Vivian, Younger & Bond, of London, a British partnership firm; and the Compagnie des Minerais, a Société Anonyme of Liège, Belgium.

A very intimate and complicated inter-relationship existed between these various companies and firms in respect of the directorships, shareholdings, and general business relations. Detailed particulars were given in evidence. It would not conduce to lucidity, or serve any useful purpose, to recount these details. Suffice it to say, at this point, that the hand of the Metallgesellschaft was to be seen, and its powerful influence exhibited, at all times and places.

to German ports, and seized in the Port of London on October 12, 1914, and subsequently condemned as prize.

*Stuart Bevan*, for the claimants, stated that they were pledgees of the bills of lading, and, wishing to exercise their rights, paid the freight in order to get possession. The goods were freed from the burden of freight, which otherwise the Admiralty Marshal would have had to pay, and the claimants, therefore, should be reimbursed out of the proceeds of sale.

*L. F. C. Darby*, for the Crown, argued that as payment was made long after war had broken out, and the claimants knew that the goods were going to Germany, they made the payment at their own risk, and must look to the German consignees for reimbursement.

SIR SAMUEL EVANS (THE PRESIDENT) said that a payment of money under these circumstances to enable the claimants to realise their security gave no case in law against the Marshal, and the claim would be disallowed.

The goods were seized in the port of Brixham on September 23, 1914. The claims were filed at various times and in varied forms.

It is necessary to examine them, and to bear in mind by whom and on what grounds they were made.

On November 17, 1914, the first formal claim was put in by Messrs. Henry R. Merton & Co., Lim. They claimed all the goods—the zinc and leady concentrates—as “the true, lawful and sole owners,” at the time of seizure, because they had accepted the shippers’ drafts for the value of the goods, taken up the shipping documents, and paid the freight.

Among the grounds of the claim are statements to the effect that the zinc concentrates were intended to be sold to the *Compagnie des Minerais*, but that, as this company had not paid for them, the property belonged to the claimants; and that the leady concentrates were consigned to the *Metallgesellschaft* for sale, and had in fact been sold by the *Metallgesellschaft*, before seizure, to a Belgian company at Hoboken. It was also stated that the *Metallgesellschaft* were to sell the leady concentrates for the joint account of the Australian Metal Co., Vivian, Younger & Bond, the *Metallgesellschaft*, and Henry R. Merton & Co., Lim.

The claim does not state by whom the zinc concentrates were sold or “intended to be sold” to the *Compagnie des Minerais*.

On January 25, 1915, Messrs. Henry R. Merton & Co., Lim., filed their second claim. The grounds are somewhat amplified, but not substantially different. They claimed again as the owners of the goods.

On June 29, 1915, a third claim was filed on behalf of three claimants—Henry R. Merton & Co., Lim., the Australian Metal Co., Lim., and Vivian, Younger & Bond.

Messrs. Henry R. Merton, Lim., again claim the whole on the same grounds as before. In the alternative they, and the Australian Metal Co., and Vivian, Younger & Bond, claim one-fourth share each in the leady concentrates, as three members of a “pool designated the four-fourths account,” of which the other member was the *Metallgesellschaft*. The claims as to the zinc concentrates were formulated as before.

Finally, on August 12, 1915, the fourth claim was filed. In this the *Compagnie des Minerais* claim the zinc concentrates as:



the owners "if it should be held that the property in same had passed from the said Henry R. Merton & Co., Lim."

The cases of the zinc cargoes and the leady cargoes were put forward separately and dealt with on different grounds, although in the maze they not infrequently run into each other.

The Australian Metal Co., Lim., who shipped all the goods, had been brought into existence and established by the Metallgesellschaft, Henry R. Merton & Co., Lim., and Vivian, Younger & Bond in 1897. For the circumstances reference is made to three agreements bearing date December 16, 1897.

These agreements comprised the business in all ores and metals. The business was known as that of the three-thirds account. It was alleged that the business in zinc ores was some time afterwards, and many years ago, excluded from that account, and transferred to the Compagnie des Minerais, and that it became a separate business between the Australian Metal Co., Lim., and the Compagnie des Minerais, of Liège, the Australian company buying the zinc ores in Australia and sending them over to the Compagnie des Minerais as purchasers in Belgium. [His Lordship then dealt with the documentary evidence in support of the alleged transfer, which, he said, was wholly insufficient, and after reviewing the evidence as regards the zinc concentrates at considerable length said that the facts cogently compelled him to the conclusion that the Metallgesellschaft were the real purchasers to whom the goods were sent. His Lordship continued:] I find upon these facts that at the time of seizure the cargo of zinc concentrates belonged to the Metallgesellschaft, and I pronounce their condemnation as enemy property to the Crown, as lawful prize in the Crown's right to them as droits of Admiralty, being seized in port after the outbreak of hostilities.

There remains to be dealt with the consignment of 1,006 tons of leady concentrates.

These goods are claimed to have belonged as to three-fourths thereof to three British business houses as members of the "pool designated the four-fourths account formed by the Metallgesellschaft," and the release or restitution of these three-fourths is demanded accordingly, as if the pool were a partnership consisting of three British partners and one enemy partner.

Counsel for the claimants described the combination as "A common interest, and not a partnership in the sense in which

one usually thinks of a partnership carrying on a joint business." It was, he said, "An arrangement which is not a partnership in the sense of a firm being constituted to carry on general business; four independent persons—three of them British and one of them German—agree that they will embark on a principle of joint adventure, and share the profits and loss." And he argued that under such a scheme the property was the joint property of the four.

That there was a joint adventure in one sense cannot be disputed, because a certain division of the ultimate profits had to be made. But as to whether the goods were ever the joint property of the four firms or corporations interested is open to grave doubt. In my view the position was that the Metallgesellschaft were the owners of the property, although they had to account to the three other members of the pool for the ultimate profits. [His Lordship dealt with the evidence on this point, and continued:] If this view is the right one, the question to be determined in these proceedings is at once solved, because the goods would clearly be enemy property, and therefore subject to condemnation.

If my view is erroneous, it can be rectified by the tribunal of appeal.

I must, however, deal with the claim from the alternative standpoint, on the assumption that the case must be considered as if the goods belonged to a partnership.

The partnership would consist of four members, A, B, and C being in the position of British subjects, and D a German subject. And the question to be determined would be, what the position was in the circumstances of this case with regard to the right of capture or seizure of the goods at sea after the commencement of hostilities. If a subject of a belligerent or a neutral had a business in hostile territory at the outbreak of war, and resided there, he would, according to international law, have a commercial domicile there, and his goods would be subject to capture at sea after hostilities, although shipped before the war—*THE VENUS* [1814] (8 Cranch, 253).

Apart from a commercial domicile by residence, the property of a person may acquire a hostile character independently of his national character or his personal residence. If a person be a partner in a house of trade in an enemy's country, he is, as to the concerns and trade of that house, deemed an enemy

(*Pratt's Ed. of Story*, p. 60). And the property of the house of trade established in an enemy country is considered liable to capture and condemnation as prize—*Wheaton's International Law*, 334.

The rule is succinctly stated by Mr. Justice Story in *THE FREUNDSCHAFT*; *sub nom.* *THE FRIENDSCHAFT* [1819] (4 Wheaton, at p. 107): "It has been long since decided in the Courts of Admiralty, that the property of a house of trade established in the enemy's country, is condemnable, as prize, whatever may be the domicile of the partners. The trade of such a house is deemed essentially a hostile trade, and the property engaged in it is, therefore, treated as enemy's property, notwithstanding the neutral domicile of any of the company."

But it seems also to be settled that in such cases confiscation will not take place at the commencement of war if the trade has been carried on during peace, unless the person affected continues his connection with the trade after the war—*Pratt's Ed. of Story*, p. 61, *Calvo*, s. 1936, *THE VIGILANTIA* [1798] (1 C. Rob. 1, at p. 15), and *THE SAN JOSÉ INDIANO* (2 Gall. 267, at p. 288).

It is not easy to see why, in the case of a partner in a hostile house of trade, time should be given to sever connection after war before confiscation by capture at sea is permitted, when no such opportunity is given to a person having a commercial domicile by residence in hostile territory. But I accept the law as it stands. And, indeed, it may be that the dissenting judgment of Chief Justice Marshall in *THE VENUS* (8 Cranch, at p. 288) is based on the more equitable ground, as many writers on the law of nations have contended. Counsel for the claimants, however, argued that there was no house of trade in Germany in this case in which the four bodies concerned were partners or had any shares; that "the business was a joint one carried on by joint adventurers which had its seat nowhere."

I cannot accept this contention. It is inconsistent with the position of the *Metallgesellschaft* as exhibited in the documents, and as exemplified by their conduct of the business. When asked as to the part taken by the German company in the joint business, Mr. Minto Wilson said: "The *Metallgesellschaft* really kept the accounts in Frankfort; they undertook the selling on the Continent; they corresponded with the Australian Metal

Company with regard to the shipments, and they generally managed the account."

The Australian Metal Co., Lim., seem to have had nothing to do with the goods after shipping them; Messrs. Henry R. Merton & Co., Lim., only did the financing, and received—in advance, as stated—funds to meet the drafts from the German company, and Vivian, Younger & Bond do not appear to have had anything to do with reference to the buying, or shipping, or disposal of the goods. They guaranteed a share of Messrs. Henry R. Merton & Co.'s obligations to the bank, and that was all.

In discussing the commercial domicile of a merchant Calvo says: "*On peut donc dire, s'il s'agit d'un négociant, qu'il a son domicile commercial au siège principal de ses affaires, sur le point où se concentrent ses opérations*" (4th ed. vol. iv. s. 1933, p. 67).

The whole centre of activity and operations of this business was at Frankfort, at the offices of the Metallgesellschaft. They ordered, they bought, they chartered vessels, they gave all instructions, they received the consignments, they paid for the goods, they sold or disposed of them, they received the purchase prices, they attended to all the correspondence, and kept all the accounts at their head house at Frankfort.

How could it be held that the house of trade of this business was not at Frankfort? If there was no house of trade of the business in Germany, or elsewhere, as contended, then (whatever might be the difficulties in the way of British subjects continuing in the business) neutrals of all countries might engage in the business with impunity, and without fear of confiscation of their shares, and to the great advantage of the German company and of the German State, as well as of themselves.

I feel no doubt in deciding that this business had its house of trade in Frankfort.

The question upon which the right to seize and confiscate the shares of the *quasi*-partners, then, turns upon whether they continued their connection with the house of trade after the commencement of the war.

I have not found any direct decisions which help. It is obviously a question of fact in any particular case whether there has been a continuation of the connection with a hostile house

of trade during war, or whether sufficient steps have been taken, and in proper time, to sever the connection.

Some guidance is afforded by the principles and tests applied in cases relating to subjects of a cognate kind—for example, continuing to trade with the enemy after war or continuing a commercial domicile by residence after hostilities have begun.

An instance of the former occurs in *THE HOOP* [1799] (1 C. Rob. 196, at p. 216; 1 Eng. P.C. 104, at p. 116), where Lord Stowell said that the rigid rule against such trading had been enforced “where cargoes have been laden before the war, but where the parties have not used all possible diligence to countermand the voyage after the first notice of hostilities.”

An illustration of the latter kind will be found in Chief Justice Marshall’s celebrated dissenting judgment in *THE VENUS* (8 Cranch, 253), where he discusses how a resident commercial domicile might be terminated—for example: “If a British subject residing abroad for commercial purposes takes decided measures, *on the breaking out of war*, for returning to his native country . . .” (p. 314).

And in another passage (at page 315): “An immediate discontinuance by trade, and arrangements for removing, followed by actual removal within a reasonable time, unless detained by causes which might sufficiently account for not removing, would fix the intention to change the domicile.”

In discussing the question of confiscation of goods belonging to non-enemy parties in a house of trade (*maison de commerce*) in enemy territory, Calvo wrote as follows: “*D’après ces principes, si un négociant domicilié dans un pays neutre ne prend pas au commencement de la guerre des mesures immédiates pour retirer ses biens d’un commerce qui n’a plus le caractère neutre et auquel il pouvait légitimement se livrer en temps de paix dans le pays d’un belligérant, il ne pourra garantir ses biens de capture et de confiscation hostiles, en alléguant que personnellement il réside dans un pays neutre*” (vol. iv. s. 1937, p. 70).

If it be obligatory upon a neutral to take such immediate steps (*sans retard* is another phrase used by Calvo) it is none the less obligatory upon the subject of a belligerent.

I think also that it is incumbent on the person who has to sever his connection in this way to shew clearly by satisfactory proof that he took steps to do so, just as it rests upon a resident

in hostile territory to prove that he was not there *animo manendi*—cf. *THE BERNON* [1798] (1 C. Rob. 101; 1 Eng. P.C. 70).

It is a case like those where the burden of proof has been laid upon claimants on the ground that they have in their own power the knowledge of all the relative facts, and so can prove their case fully if it be honest and well founded. It is their duty to take the necessary measures to end the connection with the hostile house, and it is for them to establish affirmatively the measures alleged to have been taken.

No evidence was given by or for either of the claimants that they did anything to put an end to their connection, whatever it was, with the Frankfort house of the Metallgesellschaft. Messrs. Henry R. Merton & Co., Lim., as was shewn in the case of *THE BILBSTER* (*post*, p. 507*n.*), tried to protect the property which had been bought and sold by the German company from capture; with that object they paid the 5,000*l.* freight, and debited it in their books against the Metallgesellschaft as a payment made on their account.

The transactions with reference both to zinc and leady concentrates were somehow carried on by these claimants so that an anticipated debit in the German company's account of about 400,000*l.* at the end of September had been reduced to about 27,000*l.* by April, 1915.

They continued to meet all the drafts for the goods. They paid 1,046*l.* freight on the leady concentrates to the owners of the *Manningtry* on October 9, and debited it to the Metallgesellschaft, Australian concentrates charges account.

Did they do anything to countermand or divert the voyages of the vessels afloat at the outbreak of the war carrying the concentrates so as to prevent a possible delivery to the Metallgesellschaft? More especially, did they do anything with reference to those vessels belonging to Germany, bound for German ports like Hamburg, Bremen, and Stettin—so as to prevent the delivery of the ore cargoes to the Metallgesellschaft, in case the vessels might escape the vigilance of British or Allied cruisers? There was no proof of any such action on their part.

Did the Australian Metal Co. in Australia put an immediate end to the buying or shipping, or to their connection, either through Australia or in London? They had an office in London where material facts would be known.

As to Vivian, Younger & Bond, none of the firm or their employees were seen or heard in these proceedings as to their claim or conduct.

Upon the whole case, if the claimants are to be regarded as partners, or persons having shares in the German house of trade, I find that none of them took immediate steps or any steps to put an end to their connection with that house by reason of the outbreak of war, and their shares in the goods must, upon this footing, also suffer condemnation.

I accordingly pronounce judgment of condemnation of all the goods claimed as good and lawful prize seized on behalf of the Crown as droits of Admiralty.

As to the 1,046*l.* paid by Henry Merton & Co., Lim., for freight on October 9, the facts were similar to those relating to the payment of the freight in *THE BILBSTER*,<sup>2</sup> with this circumstance in addition, that the payment was made after

(2) *THE BILBSTER*. In this case, tried before the President on the same day as *THE MANNINGTRY*, H. R. Merton & Co., Lim., who had paid 5,000*l.* in respect of freight on a cargo of zinc concentrates shipped by the Australian Metal Co., Lim., at Port Pirie for Antwerp, in the British steamship *Bilbster*, claimed to be reimbursed by the shipowners, or, failing in that, by the Crown, out of the proceeds of the condemned cargo.

Oct. 6.—SIR SAMUEL EVANS (THE PRESIDENT), in the course of his considered judgment, in which he disallowed both claims, said: As against the shipowners, it was contended that the consideration for the agreement, upon which the 5,000*l.* was paid to the shipowners on account of the whole freight, was that the shipowners should actually deliver to Messrs. Henry R. Merton & Co., Lim., the whole of the cargo out of the ship so as to place them in the position of owners. All the shipowners were interested in was the freight, and they continued to assert a lien to the goods until the whole freight was paid or agreed to be paid. On payment of the 5,000*l.* they gave up this claim to the lien, and proceeded to discharge the cargo out of the ship. That was all, in my view, which they had contracted to do. They did not guarantee that in any event delivery should be given to Messrs. Henry R. Merton & Co., Lim. The fact that the Crown afterwards seized the cargo does not affect the shipowners, and gives no right whatever to Messrs. Henry R. Merton & Co., Lim., to have the 5,000*l.* repaid by the shipowners.

Failing in this, Messrs. Henry R. Merton & Co., Lim., asked that the amount should be paid by the Crown to them out of the proceeds of the prize.

Where freight has been innocently and honestly paid by persons in respect of cargoes afterwards seized, which would have had to bear the burden of the freight if unpaid, it may be equitable that the payment should be recouped by the captors; but, broadly speaking, in such a case the payment would have to be made in the usual course of business, and in circumstances where there was a request, expressed or implied, by the captors that the payment should be made; or where the captors

Messrs. Henry R. Merton & Co., Lim., knew of the capture. It is not necessary to repeat what I said upon this head in that case. The claim must be disallowed.

As to the claim of the Union Bank of Australia, Lim., this banking company asks for an order that the sum of 3,100*l.*, which they had paid to the shipowners on account of freight on three consignments of zinc concentrates (total 3,054 tons) which have been condemned, should be repaid to them out of the proceeds. The whole freight amounted to 3,207*l.* 6*s.* The 3,100*l.* was paid in two sums on September 28 and 29, 1914.

The bank thought they were entitled to have the goods delivered to them as holders of the bills of lading, and the cargoes were discharged into lighters employed by them. The goods had, in fact, been seized on behalf of the Crown on September 23.

The bank had no knowledge of this when they paid the 3,100*l.* They did not learn of the seizure till after the writ was issued on October 1. They refused to pay the balance.

When the officers of the Crown seized the goods, if no freight had been paid, the goods would only be taken *cum onere* of whatever ought to be allowed for the carriage in lieu of freight. The bank innocently and honestly made the payment under a mistake, and so relieved the goods of that onus.

had done some act shewing their acquiescence in, or adoption of, the payment.

A voluntary payment by persons for motives or purposes of their own would not be sufficient ground for a claim for recoupment. Still less would it be if there were involved in the motives a desire to defeat the rights of a belligerent, or to escape a rightful seizure by the Crown.

I have set out the circumstances in which Messrs. Henry R. Merton & Co., Lim., made the payment. They had no title whatever to the goods. There is no evidence that the *Compagnie des Minerais* had any right to the goods, or that the payment was made by Messrs. Henry R. Merton & Co., Lim., at their request, or on their behalf, or even with their knowledge. . . . The whole of the 5,000*l.* was debited by Messrs. Henry R. Merton & Co., Lim., in their books of account to the *Metallgesellschaft*, of Frankfort, which is evidence of their having paid it on behalf of this enemy firm.

For whomsoever it was paid, Messrs. Henry R. Merton & Co., Lim., made the payment in order to try to preserve the goods for the owners, whom they knew to be enemies, and to gain some possible advantage to themselves, or their principals or co-adventurers, the *Metallgesellschaft*. And in acting thus they appear not to have hesitated to engage in commercial intercourse with enemies of this country.

This claim is one which has no sort of foundation.



If they had known of the seizure, they would not have paid the money. The facts differentiate the case from *THE CLAN URQUHART* (*ante*, p. 498*n.*), where the claim of Huth & Co. was disallowed.

No question was raised as to the amount.

In the circumstances I hold that it is just and equitable that the money should be repaid to the bank, and I make an order that the Marshal do accordingly pay to the bank the sum of 3,100*l.* out of the proceeds of sale of the condemned cargoes.

There will be a reference on the principles of *THE JUNO* (*ante*, p. 151) for the Registrar to assess the amount of freight still due to the shipowners.

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*Solicitors*—Treasury Solicitor; Waltons & Co.; Bircham & Co.; Downing, Handcock, Middleton & Lewis.

[*Reported by E. C. Trehern, Esq., Barrister-at-Law:*

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[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). Oct. 20, 25, 1915.

THE FLAMENCO. THE ORDUNA.

*Enemy Subject—Trade Domicile in Neutral Country—Departure to Another Neutral Country on Outbreak of War—Loss of Neutral Domicile—Seizure of Cargo—Release on Bail—Bail Bond—Sale—Amount Realised Less than Amount of Bond—Condemnation of Goods—Order for Payment of Full Amount of Bond.*

*An enemy subject who has acquired a trade domicile in a neutral country loses that domicile if, on the outbreak of war, he leaves the neutral country for another neutral country, in the absence of evidence that his departure is merely temporary.*

*Where goods seized as prize are released on bail, the amount of which has been fixed by agreement between the parties, such amount, in the absence of special circumstances, is to be taken as the admitted value of the goods, so that if the goods are*

*condemned, and have realised less than the amount of the bond, the full amount of the bond must be paid into Court.*

Two suits, tried together, for condemnation of cargoes.

The subject-matter of these claims was a quantity of copper shipped before the outbreak of war in the British steamships *Flamenco* and *Orduna* by one Moritz Hochschild, at Coquimbo in Chile, and consigned to his order, Liverpool. The cargoes were seized as prize, and the Crown now claimed their condemnation.

A claim was put in by the Anglo South American Bank, Lim., "on behalf of themselves and others as the true and lawful owners," in which they alleged that the property in the goods was, at the time of seizure, vested in the claimants, and/or H. A. Watson & Co., and/or Dennis & Co., and/or Moritz Hochschild. H. A. Watson & Co. were the selling brokers in Liverpool, and Dennis & Co. were the purchasers, but no claim was in fact made by either of these claimants.

The Court found that the property in the goods remained in Moritz Hochschild, and the case is reported on the question whether he had lost his neutral trade domicile.

The facts sufficiently appear from the judgment.

*R. A. Wright* and *Le Quesne*, for the Crown.

*Leck, K.C.*, and *J. G. Joseph*, for the Anglo South American Bank.

*Cur. adv. vult.*

Oct. 25.—SIR SAMUEL EVANS (THE PRESIDENT).—This claim relates to 573 bags of copper matte and 56 bags of copper regulus shipped from Chilian ports on c.i.f. contracts to Liverpool. The bills of lading are dated August 2 and 3, 1914, respectively. The shipper was one Moritz Hochschild, and the bills of lading were made out to himself or order or his assigns.

It did not appear on what dates the voyages began, but the case was argued as if the goods were shipped and dispatched on voyage before the outbreak of war. The *Orduna* arrived at Liverpool on September 30, and the *Flamenco* on October 22.

The Customs authorities refused to allow the goods to be delivered pending proof of ownership on suspicion of enemy interest. The formal seizure was on November 9.

Hochschild was a German subject who carried on his trade in a neutral country—namely, at Coquimbo in Chile.

In this trade he was financed by the claimant bank, who had a branch bank at Coquimbo. The bank's registered office is in London.

The course of business is deposed to by Mr. Beazley in his affidavit in the *Flamenco*, sworn on November 21, 1914.

Hochschild did not draw on the bank, and the bank did not make any advance, against the shipment of the fifty-six bags of copper regulus. Whether this was because Hochschild may already have left Chile I do not know. It is strange that the shipping documents for this cargo were not sent by the bank's branch at Coquimbo to the London office till September 9, as appears by the letter of that date, in which it is said that Mr. Hochschild had not drawn against that shipment.

The first account of the position adopted by the bank was given in the two affidavits of Mr. Beazley, sworn on November 1. Their claim then was that they were the owners of the goods. Not a word was said in the affidavits about Dennis & Co., or about any ownership or interest of theirs in the goods.

It is clear that at all material times the bills of lading and shipping documents were in the hands of the bank as pledgees or of their agents, Watson & Co., on their behalf.

In their formal claim, filed on January 28, 1915, the bank claim "on behalf of themselves and others as the true and lawful owners," and allege that the property in the goods was, at the time of seizure, "vested in the claimants and/or H. A. Watson & Co. and/or Dennis & Co. and/or Moritz Hochschild." No claim in fact is made by Dennis & Co., or Watson & Co., or Hochschild, and the claimants exhibited no authority to claim except on their own behalf.

Their own claim as pledgees cannot, according to the law of this Court, avail them. But being interested as pledgees, they have a right to be heard upon the question whether the goods seized are confiscable as enemy property.

There were two contracts entered into between Hochschild as seller, and Dennis & Co. as purchasers of the goods, one dated March 27 and the other July 21, 1914. It does not appear to me to matter whether the goods were shipped under the one or the other, but, judging from what was done after the cargo

was released on bail, the goods were assumed to have been sold under the first contract.

The shipping documents were never delivered or tendered to the buyers before seizure, and I think it is clear upon the authorities that, in the circumstances proved, the property had not passed to the purchasers. The property in the goods at the time of seizure remained in the seller, and that is the question upon which, as it is now accepted after the decision in *THE MIRAMICHI* (*ante*, p. 137; [1915] P. 71), the confiscability of the goods depends.

Having decided that the property in the goods was in Hochschild, it remains to determine the character of Hochschild. Was he an enemy, owing allegiance to Germany in his original character of a German subject? Or was he, though a German subject, a person having a commercial domicile trading in a neutral country, and entitled to be treated as such in relation to his property engaged in that trade?

In the claim and affidavits of the bank it is stated that, "though a German subject, he does not reside or carry on business in any enemy country." That does not supply the proper test. If he had given up his trade domicile in Coquimbo, it matters not to what country he betook himself. If he had gone to the United States of America, or to Switzerland (as was suggested), he would, for the purposes of this case, be as clearly an enemy as if he had, from a sense of patriotic duty, returned to his native state.

In a letter of November 6, 1914, the bank say that Mr. Hochschild was believed at that time to be in Switzerland. From a later letter it appears that the information they had was that he was at Zurich. If he was in Switzerland early in November, he must have left Chile long before the seizure. From the letter of September 9, sent by the bank's Coquimbo branch to London, I think it is safe to infer that Hochschild had left before that, otherwise he would have drawn on the bank against the fifty-six bags of copper. It was not suggested that any commercial business brought him so near to Germany as Switzerland. Questions arose relating to the *Orduna* shipment immediately on her arrival at Liverpool on September 30. The bank, through their own branch at Coquimbo, would have the means of knowing whether he was still there or whether he had left with the intention of returning.

It is stated that he was indebted in a large sum to the bank, so that they would not be devoid of interest in the whereabouts of their debtor. For a period of well over a year it does not appear that the bank in London or their branch in Chile have had any communication with him.

Upon general principles the Courts have taken the view that the native character easily reverts, and it requires fewer circumstances in war time to shew a resumption of the native domicile than to prove the assumption or continuance of a neutral trade domicile in one country of a subject originally native of another country—see *LA VIRGINIE* [1804] (5 C. Rob. 98), *THE ANNE GREEN* [1812] (1 Gall. 274, at p. 286), and *THE FRANCIS* [1813] (1 Gall. 614, at p. 616).

These considerations are not less cogent in the case of native Germans who have emigrated to other lands for the purposes of profit than in that of other nationalities.

In his classical judgment in *THE INDIAN CHIEF* [1800] (3 C. Rob. 12; 1 Eng. P.C. 251) Lord Stowell, in discussing the national character of Mr. Johnson, who had been settled in England as American Consul, said: "Taking it to be clear that the national character of Mr. Johnson as a British merchant was founded in residence only, that it was acquired by residence, and rested on that circumstance alone, it must be held that from the moment he turns his back on the country where he has resided, on his way to his own country, he was in the act of resuming his original character, and is to be considered as an American. The character that is gained by residence ceases by residence. It is an adventitious character which no longer adheres to him from the moment that he puts himself in motion, *bona fide*, to quit the country, *sine animo revertendi*" (3 C. Rob., at p. 20; 1 Eng. P.C., at p. 254).

Chief Justice Marshall, in his elaborate judgment in the United States Supreme Court in *THE VENUS* [1814] (8 Cranch, 253, at p. 288), founds part of his argument upon the duty of a citizen to return to his native State in times of war, and was prepared to say, at any rate where the commercial domicile was in enemy territory, that there was a natural presumption in favour of his intention to return.

Upon this part of the case I must regard the facts and the evidence as if the claim were made by or on behalf of Hochschild himself.

Upon the evidence, and for want of explanations which might have been afforded if the absence of Hochschild from his business at Coquimbo were merely temporary and transitory, and had no connection with Germany or the war, I conclude that before the seizure he turned his back upon Chile and his face towards Germany; that he abandoned his adventitious commercial residence and domicile at Coquimbo, and revested himself fully in his original native garb as a German subject. I may add that if Hochschild had started for Germany, and so reverted to his original domicile, any return later during the war to resume his business in Chile would not give him again a neutral commercial character so as to separate him from that of his native country—see *per* Mr. Justice Story in *THE DOS HERMANOS* [1817] (2 Wheaton, 76, at p. 98).

Upon these grounds I find that the goods were the property of an enemy at the time of capture, and as such they were subject to condemnation as droits of Admiralty belonging to the Crown.

I pronounce judgment accordingly, and order payment into Court for the benefit of the Crown of the amount of bail given on the release of the goods.

*Leck, K.C.*—The amount of the bail bond is larger than the sum realised by the sale of the goods, and it is submitted that the bond, being an undertaking to indemnify, does not extend to an amount in excess of the realised value of the goods. Therefore all that the Crown is entitled to is payment into Court of that amount.

*Le Quesne.*—All the circumstances were taken into account when the amount of bail was fixed, and the Crown is entitled to payment of the full amount of the bond.

SIR SAMUEL EVANS (THE PRESIDENT).—When these questions of bail come before me the amount of the bond is taken to be the admitted value. I decline to have these interlocutory questions raised afterwards. The value was probably agreed by the parties when they came before the Registrar. I myself always fix the amount once and for all. Of course, if the order is for a very much larger sum than is likely to be produced, that is a wholly different thing. Here the sum fixed happens to be very near the sum realised. If the Registrar fixed the amount

by agreement between the parties, it cannot be altered. If he had guessed an outside figure it would be another matter. I am told by one of the Registry officials that the Registrar has always adopted the same practice as myself. Therefore, in these circumstances, I order the full amount of the bail bond to be paid into Court. I will, however, give the claimants liberty to apply in the matter, but it must be on due notice to the Registrar.

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*Solicitors*—Treasury Solicitor; Davidson & Morriss.

[*Reported by E. C. Trehern, Esq., Barrister-at-Law.*]

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[IN THE SUPREME COURT OF HONG-KONG. IN PRIZE.]

REES-DAVIES, C.J. Dec. 2, 1914. April 14, 15, 1915.

### THE PAKLAT.

*Enemy Ship—Removal of Fugitives from Enemy Base—Expectation of Blockade—Philanthropic Mission—Second Hague Peace Conference, 1907, Convention XI. art. 4.*

*An enemy ship carrying women and children fugitives from a naval and military base of the enemy, a blockade of which is expected, is not "employed on a philanthropic mission" within the meaning of article 4 of Convention XI. of the Second Hague Peace Conference, 1907, so as to exempt her from capture.*

Cause for condemnation of enemy ship as prize.

On August 21, 1914, the *Paklat*, a German steamship of 1,657 tons belonging to the Norddeutscher Lloyd Linie, whilst bound from Tsingtau to Tientsin with women and children refugees, was captured by H.M.S. *Yarmouth* and brought to Hong-Kong as prize. The blockade of Tsingtau was then imminent, and it was in fact besieged by the Allied forces on August 27.

It was contended on behalf of the owners that the vessel, which, it was alleged, was going to be interned at Tientsin to

be used for the housing of destitute refugees, was "employed on a philanthropic mission" within the meaning of article 4 of the Eleventh Hague Convention, which exempts from capture "vessels employed on religious, scientific, or philanthropic missions."

*J. H. Kemp* (*H.M. Attorney-General for Hong-Kong*), for the Crown.

*Eldon Potter*, for the claimants.

*Cur. adv. vult.*

*April 15.*—REES-DAVIES, C.J.—This ship was taken and seized as prize by *H.M.S. Yarmouth* on August 21, 1914, off the Shalientau Island, and was brought to the port of Hong-Kong. It is now asked that she be condemned as prize.

The defence, as set up on affidavits of the master of the vessel, alleges that she was requisitioned by the Government at Tsingtau on the outbreak of war to carry women and children to Tientsin, as the train service was overcrowded, and the intention was to intern the ship at Tientsin until the end of the war, the ship to be used in the meantime to house such women and children as had insufficient means to live on land. It is also alleged that the ship was specially fitted for this purpose.

The master also states that he had express instructions from the Tsingtau Government to fly the German flag and the Parliamentary flag (white truce flag) at the foremast, and to carry all lights at night. It is also alleged that the ship was available for any women or children of any nationality, other than Chinese, who might wish to avail themselves of her use, and that no passage money was demanded or paid by the passengers in question.

Under these circumstances it is contended that she was on a "philanthropic mission" within the meaning of article 4 of the Eleventh Hague Convention, 1907, and is exempt from capture.

At the outset of the proceedings I expressed the strongest doubt as to whether it could be so regarded, and the Crown has since fortified me with an extract, under the hand and seal of the Assistant Under-Secretary of State for Foreign Affairs, of the official report of the committee of the *Deuxième Conférence Internationale de la Paix, La Haye, 1907* (*Actes et*



*Documents*), which, I think, leaves no reasonable doubt as to the construction to be placed on the article in question. It reads (*inter alia*): "It is obvious that such a favour can only be granted under the condition that there is no intermeddling (*immiscer*) in the war operation. In order to avoid all difficulties the Power whose ship in question bears the colours must refrain from involving her in any war service." "The favour granted to the said ship bestows upon her a sort of neutralization which must last until the end of (all) hostilities, and which must prevent her from having her destination altered."

Now, as to the construction which has to be placed on the foregoing language, I entirely agree with the Attorney-General's rendering, and will adopt the words which he used in argument. The word "neutralization" here means that the ship is placed entirely outside the pale of any warlike operations, and must in consequence keep herself entirely apart from any service in connection with the war or that may have any effect on the war.

It was contended on behalf of the owners that the intention to intern the refugees at Tientsin was a philanthropic mission, and the recent decision of Mr. Justice Gompertz in *THE HANAMETAL* (*ante*, p. 347), a neutral vessel, was relied upon; that the carrying of refugees was not intermeddling with warlike operations, and so was not a breach of neutrality law. I think that there is no real analogy between the reasoning adopted in that case and the present. There is a fundamental difference, as the Attorney-General contends, between the "neutralization" of an enemy ship within the meaning of the official report on the Convention and the neutrality of a non-belligerent ship. There are many things which the latter may be able to do which in some measure may affect the war without rendering herself liable for a breach of neutrality, and in such case it must be demonstrated to the Court by the captor that some unneutral service has been performed. This onus, I understand, is what the Crown failed to discharge in the case of *THE HANAMETAL* (*ante*, p. 347).

The fact that a neutral ship may carry refugees without being liable to capture does not imply the same power in an enemy ship, although given *une sorte de neutralisation* for the purpose of the philanthropic mission in question. To construe "philanthropic mission" as suggested might lead to serious consequences which clearly could not have been contemplated

by the article, and it might enable an enemy vessel to escape to a neutral port under any similar professed act of philanthropy. If it were intended to cover such an act as the conveyance of non-combatants under such conditions to a neutral port, the Convention would not have left it in such vague and indefinite language; and some such system as safe conducts furnished in advance would presumably have been contemplated, as, I understand, has often been the custom in the case of expeditions dispatched for the purposes of science or religion and in the case of cartel ships.

I may add that, assuming the blockade had existed at Tsingtau (which, I understand, in fact did not exist until August 27), no rule of law exists which obliges a besieging force to allow all non-combatants, or only women, children, the aged, the sick and wounded, or subjects of neutral Powers, to leave the besieged locality unmolested. Although such permission is sometimes granted, it is in most cases refused, because the fact that non-combatants are besieged together with combatants, and that they have to endure the same hardships, may, and very often does, exercise pressure upon the authorities to surrender—see *Oppenheim's International Law*, vol. ii. p. 193. This being the case, if the Convention ever contemplated such a “philanthropic mission,” which in the case of a blockaded port would come directly in conflict with the custom I have stated, it would have provided for it in express and unequivocal language.

The decision I give is that the vessel was properly seized as a prize of war, and that she is subject to condemnation. There will be a decree of condemnation, the Crown to receive such costs as have been occasioned by the claim.

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[IN H.M. COMMERCIAL COURT FOR MALTA. IN PRIZE.]

PARNIS, J. April 26. May 10, 1915.

THE ANASTASSIOS KORONEOS.

*Cargo—Enemy Goods—Neutral Ship—Delivery to Collector of Customs—Mistake of Fact—Seizure as Prize—Freight—Insurance.*

*Before the outbreak of war certain goods were shipped by Turkish merchants on a German vessel, and consigned to agents for sale at Malta. In consequence of the outbreak of war between Great Britain and Germany the German vessel deviated to a neutral port, and the goods were transhipped and forwarded by a Greek steamship to Malta, where they arrived after a state of war existed between Great Britain and Turkey. In the belief that the goods were the property of the Maltese consignees, they were handed over by the ship to the Collector of Customs:—Held, that, having been voluntarily handed over, when put overside into lighters the goods were no longer covered by the neutral flag, and, as enemy property seized afloat, were confiscable as prize. Held, further, that while the Greek shipowners were entitled to freight for the carriage of the goods to Malta, a claim for the freight paid to the German shipowners by the Greek steamship company in order to obtain the release of the goods, and war risk insurance placed by them with a German insurance company, must be disallowed.*

Cause for the condemnation of goods as prize and droits of Admiralty.

The subject-matter of this suit was certain goods, the property of Abraham Hudi & Fils, an Ottoman firm at Antioch, shipped on July 24, 1914, at Alexandretta in the German steamship *Kitnos*, of the Deutsche Levante Linie, and consigned to agents for sale at Malta—Messrs. Ellul & Hanania. After the outbreak of war between Great Britain and Germany the Turkish owners cabled to Messrs. Ellul & Hanania to return the bills of lading, and these were duly returned on September 23. But meanwhile the German steamer had gone to Syra to avoid possible capture by the British, and the goods had been forwarded by the National Steam Navigation Co. of

Greece to the Piræus. They were there handed over to a Mr. Frangopoulos, and by him brought in the Greek steamship *Anastassios Koroneos* to Malta, where they eventually arrived on January 26, 1915. On arrival the goods were voluntarily handed over to the Collector of Customs, apparently in the belief that they belonged to Messrs. Ellul & Hanania, and therefore were not enemy property. They were then put into lighters and landed, in accordance with the usual practice prevailing at Malta after the outbreak of war, whereby goods were detained on arrival until it was ascertained whether they were enemy property.

Messrs. Ellul & Hanania applied for the release of the goods, but stated that they were only the consignees for sale, and that the property in the goods was in the Turkish merchants at Antioch; and the goods accordingly were seized as prize.

The National Steam Navigation Co. of Greece, who had been instructed by the Turkish merchants to endeavour to recover the goods after war broke out between Great Britain and Germany, but before Turkey was also at war, in addition to the freight for the carriage of the goods from Syra to the Piræus, claimed 650.45 frs. paid by them to the Deutsche Levante Linie in respect of freight in order to obtain the release of the goods, and 209.50 frs. premium paid to a German insurance company in respect of war risk insurance.

No appearance had been entered on behalf of the Turkish owners of the goods.

*Sir Vincent F. Azopardi (Crown Advocate), for the Crown.*

*E. C. Vassalo, for the National Steam Navigation Co.*

*April 26.*—PARNIS, J.—The goods in question were shipped at Alexandretta by Abdullah Butros on a German steamer said to be the *Kitnos*. The goods were insured with a German company in the usual way, premium prepaid; freight amounting to 13*l.* 17*s.* 9*d.* was payable at Malta. Mr. Abdullah Butros acted on behalf of an Ottoman firm of Antiochia, and the goods were consigned to Messrs. Ellul & Hanania for sale for the account of the owners. War broke out between England and Germany, and the *Kitnos* took refuge at Syra to avoid capture. At that time the ship was not free, but the goods were free, Turkey being then a neutral Power. As far as I can gather,

the steamer entrusted these goods to the National Steam Navigation Co. of Greece to be carried to Malta. The goods were from Syra shipped to the Piræus, and from the latter port were forwarded to Malta by the *Anastassios Koroneos*. The claim for freight from Piræus to Malta has already been allowed.

The curious feature of this case is that the goods were shipped from Syra to the Piræus after Turkey had become a hostile Power. Possibly the forwarding agent believed that the goods belonged to Ellul & Hanania. Since the declaration of war with Germany all goods arriving at Malta are detained until it is ascertained that they are non-enemy goods, and during such examination they are considered to be goods afloat. The goods in question were found to be enemy goods, and consequently prize proceedings were instituted.

We have in the present instance enemy goods on board a neutral ship voluntarily delivered to the Collector of Customs, presumably, as I stated before, in ignorance of their being enemy goods. I do not believe that any treaty or convention applies to the present case, and therefore I must enforce the general principles of international law, that enemy property afloat is liable to confiscation, and becomes the property of the Crown by right and as perquisites of Admiralty. The question would present some difficulty if the goods had not been voluntarily handed over by the neutral steamer. Practically, as soon as the goods were voluntarily put on lighters, they ceased to be covered by the neutral flag, and became ordinary enemy property afloat in a British port.

Subject, therefore, to claims already allowed, and to any other claim of the National Steam Navigation Co., Lim., which I may hereafter allow, I condemn these goods, and order that the proceeds of sale be made over to the Crown.

*May 10.*—PARNIS, J.—I have now to deal with the claim of the National Steam Navigation Co., Lim. The amount asked for is 1212.05 frs. It consists of four items, which it may be convenient to examine separately.

One of the items, 352.10 frs., is for freight paid for carriage of the goods from Syra to the Piræus, and for expenses incurred at Syra and the Piræus. It is not usual to contest the claim for freight, and this item has not been objected to by the Crown Advocate, although it by far exceeds the original freight,

as a sum has already been allowed to Monsieur Frangopoulos. Another item, 30.00 frs., expenses said to be incurred for postage and telegrams, may also be allowed.

Another item, 209.50 frs., insurance premium paid to the Mannheim Co., covering risks of war and sea, cannot possibly be allowed. Assuming that the claimants believed the goods to be free, as the property of residents in Malta, it was absurd to insure goods with an enemy company. The claimants were well aware that the consignees were debarred from deriving any benefit from the insurance, and could not have consented to enter into any insurance contract with an enemy company.

Another item, of 650.45 frs., is claimed as "freight paid to the Deutsche Levante Linie for the carriage of the goods from Alexandretta to Malta, and contribution of the goods to the steamer's expenses in the port of Syra." This item cannot be allowed for the following reasons: The Deutsche Levante Linie had no right to full freight, especially as at the time the goods were free and the steamer was not so. Further, and this applies also to the item of 209.50 frs. above mentioned, the captor obtains possession of enemy goods free of any lien or incumbrance. No claim whatsoever for disbursements made with regard to enemy goods can be recovered in prize proceedings.

I am aware that a certain relaxation of this principle is now admitted in favour of British or non-enemy bankers or subjects who disburse money to obtain goods on which they have a lien, but the present claim is *prima facie* an attempt on the part of a neutral company to save, not only the freight due to any enemy ship, but to give the enemy a sum over and above the amount due.

The National Steam Navigation Co. of Greece had no lien on the goods, and no interest in the matter except that it was entrusted by the owner of the goods, or by the Deutsche Levante Linie, to carry out the contract which that company was unable to perform.

I therefore allow the claim for 352.10 frs., and reject the claim for any further amount. No order for costs. Time for appeal one month.

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[IN H.B.M. PRIZE COURT FOR EGYPT.]

(Sitting at Alexandria.)

GRAIN, J. June 18, 1915.

### THE ROSTOCK.

*Trade Domicile—Trade House in British Territory and in Enemy Country—Evidence of Intention to Change Domicile.*

A German merchant in Ceylon consigned goods on a German vessel to his trade house in Hamburg. For five years prior to the outbreak of war he had carried on business at Colombo, and for three years resided at a house there which he had rented and furnished, but he had returned once during the five years for several months to Germany:—Held, that this residence was not sufficient to establish a domicile in Ceylon; that his German domicile of origin still adhered to him; and that the goods, therefore, were subject to condemnation as enemy property.

This was a suit for the condemnation of parcels of cargo, consisting of copra and other goods, shipped on board the German steamship *Rostock* on July 13, 1914, by Karl Festin, of Colombo, and consigned to Karl Festin, of Hamburg. The *Rostock*, which was one of the vessels seized as prize at Port Said in November, 1914, was subsequently condemned. The Procurator-General now claimed the condemnation of various portions of the cargo.

A claim was made for the goods in question by the National Bank of India, which had discounted bills of exchange drawn by the consignor, and it was argued that the consignor still had a property in the goods, and was entitled to their release, because he had acquired a trade domicile in Ceylon.

A. Preston (*H.M. Procurator-General*), for the Crown.

G. A. W. Booth, for the claimants.

The facts and arguments are fully stated in the judgment.

GRAIN, J.—The Procurator in this case asks for the condemnation of cargo—namely, copra, bristles, and other goods—shipped on board the s.s. *Rostock*, a German ship, at

Colombo (Ceylon), by Karl Festin, and consigned by him to Karl Festin, of Hamburg. The goods were shipped on or about July 13 at Colombo, invoiced and consigned to Karl Festin, Esq., of Hamburg, by Karl Festin, of Colombo, the invoice having Hamburg printed on the left hand of the bill head, Colombo on the right hand. Bills of exchange drawn on the Anglo-Austrian Bank, London, and the Deutsche Bank, Berlin, were discounted with the National Bank of India, Colombo, but were never accepted, owing to the outbreak of war. It is not contradicted that Karl Festin, of Colombo, is also the Karl Festin, of Hamburg, and that both trade houses belong to one and the same person—namely, Karl Festin.

The Procurator argues that, on the facts placed before the Court, the property has passed from the consignor, Karl Festin, of Colombo, to the Karl Festin, of Hamburg, and even if it has not done so, that nevertheless it is enemy property, as the trade domicile of Karl Festin is Hamburg and not Colombo.

Counsel on behalf of the National Bank of India asks for the release of these goods to Karl Festin, of Colombo, in order that they may be handed over to the National Bank of India, who have discounted the bills of exchange. The direct claim of the bank itself he is debarred from urging on account of the decision in *THE ODESSA* (*ante*, p. 163; [1915] P. 52) and the former cases which led to that decision. But he argues that the goods should be released to Karl Festin, of Colombo, on the ground that he, as consignor, still retained the property in them, that a trade domicile had been established in Colombo by Karl Festin, and that on that account he was entitled to the release.

With regard to the question of trade domicile, two affidavits by Mr. E. H. Lawrence, the manager at Colombo of the National Bank of India, are put in, in which it is stated that Karl Festin was “a resident carrying on business at Colombo for five years immediately preceding October 22, 1914, except for periods between December, 1910, and March, 1911, when he went to Australia, and December, 1912, and April, 1913, when he went to Germany for the benefit of his health.” It is also stated that Karl Festin resided while at Colombo for some time at the Bristol Hotel, and latterly for three years resided at a house in Colombo which “he had taken on rent and furnished himself.” It appears from the affidavits in the case



that he left Ceylon on October 22, 1914, "at the request of the Ceylon Government," and, as far as could be ascertained, he proceeded by Dutch steamer to Holland, I presume because at that time it was the only means of arriving at his native town of Hamburg. Mr. W. F. Ross, also in the employ of the National Bank of India, gives evidence, and states that in 1889, from documents passing through the bank in London, where he was then an official, he knew that Karl Festin was carrying on business as an exporter from Germany, but that about five years ago, to the best of his belief, Karl Festin went to Colombo, and from that time fresh business began and continued between the Bank at Colombo and Karl Festin.

A number of cases have been cited to me by the Procurator and counsel for the claimants in support of their respective contentions with regard to the point of trade domiciles—*THE HARMONY* [1800] (2 C. Rob. 322; 1 Eng. P.C. 241), *THE JONGE KLASSINA* [1804] (5 C. Rob. 297; 1 Eng. P.C. 485), *MITCHELL v. UNITED STATES* [1874] (21 Wall. 350; Scott's Cases, 605), *THE SAN JOSE INDIANO* [1814] (2 Gall. 267; Scott's Cases, 614), *THE HERMAN* [1802] (4 C. Rob. 228; 1 Eng. P.C. 270 n.), *THE INDIAN CHIEF* [1800] (3 C. Rob. 12; 1 Eng. P.C. 251), *THE VENUS* [1814] (8 Cranch, 253; Scott's Cases, 591), *THE PACKET DE BILBOA* [1799] (2 C. Rob. 133; 1 Eng. P.C. 209), *THE JACOBUS JOHANNES* (Lords, Feb. 10, 1785), and *THE OSPREY* (Lords, March 28, 1795), referred to in *THE VIGILANTIA* [1798] (1 C. Rob. 1, at p. 14; 1 Eng. P.C. 31, at p. 34)—and no doubt these cases are of some assistance in arriving at the principles on which to base a decision. But on reading through them it becomes more and more clear that each case has to be decided on its own merits. And as Lord Stowell says in his judgment in *THE HARMONY* (2 C. Rob. 322; 1 Eng. P.C. 241), it "is in itself a question of considerable difficulty depending on a great variety of circumstances, hardly capable of being defined by any general precise rules."

But the judgment of Mr. Justice Swayne in *MITCHELL v. UNITED STATES* (21 Wall. 350; Scott's Cases, 605) is of great assistance in arriving at the principles of the doctrine of trade domicile. In the course of his judgment he states that the approved definition of domicile is "a residence at a particular place accompanied with positive or presumptive proof of continuing it for an unlimited time"—*GUIER v. O'DANIEL* [1806]

(1 Bin. (Penn.), 349*n.*, *per* Rush, P., at p. 352)—and later he says: “To constitute the new domicile two things are indispensable: First, residence in the new locality; and second, the intention to remain there. Mere absence from a fixed home, however long continued, cannot work the change. There must be the *animus* to change the prior domicile for another. Until the new one is acquired the old one remains” (21 Wall., at p. 351; Scott’s Cases, at p. 606).

In the present case the goods are consigned by an individual of German nationality to himself at Hamburg, and forwarded on a German ship; therefore the presumption is that they are enemy goods, and it is for the claimant to satisfy me that he has established a trade domicile in Colombo and is therefore entitled to his goods. Here we are met with somewhat of a difficulty, as Karl Festin, on whose behalf the claim is based, apparently took no interest whatsoever in the matter, and I have consequently to rely entirely upon the affidavits of the manager of the National Bank as to what the intentions of Karl Festin were concerning his change of domicile. Facts, such as a man giving up his old home in one place, taking his wife and children to his new residence, or evidence from the individual himself that he had no intention of returning to his old home, but had a fixed intention of establishing himself in the new country, which have been of such material assistance in some of the cases quoted, are entirely absent in this case. For instance, in *THE HERMAN* (4 C. Rob. 228; 1 Eng. P.C. 270*n.*) it was shewn that the claimant had removed with his wife and family from London to Embden, and had established himself and his family there, become a burgher of Embden, and had remained there for six years. But such facts as these are absent in this case, which merely rests on broken periods of residence.

Pitt Cobbett, in his *Leading Cases on International Law*, vol. ii. p. 25, states that “where a person is domiciled in a neutral country, but has a house of trade in the enemy country, he will also be deemed to have an enemy character.” This is founded on Lord Stowell’s judgment in *THE JONGE KLASSINA* (5 C. Rob. 297; 1 Eng. P.C. 485), to the effect that “A man may have mercantile concerns in two countries, and if he acts as a merchant of both he must be liable to be considered as a subject of both with regard to the transactions originating

respectively in those countries" (5 C. Rob., at p. 302; 1 Eng. P.C., at p. 488).

Is there positive or presumptive proof before me that this man, Karl Festin, shewed any intention of throwing off his enemy character and becoming a resident merchant of Ceylon? Apparently he is a man born and bred in Germany, for years carrying on his trade at Hamburg, and still doing so, and now doubtless residing there, having been requested by the authorities to leave Ceylon—it may be assumed because he was of German nationality. I am now asked to say that the affidavits of the National Bank's manager are sufficient to establish the fact that Karl Festin has thrown off his old German domicile and shewn an intention to remain for an unlimited period at Ceylon. But what does the evidence before me amount to? Merely that Karl Festin came to Colombo some time about October, 1909, stayed at the Bristol Hotel there, and started to trade with his trade house in Hamburg; that he left Colombo for Australia in December, 1910, and did not return to Colombo till March, 1911; that he again left Colombo in December, 1912, for Germany, and did not return till April, 1913. It is suggested that his return to Germany was for the sake of his health, but, if that were so, it only goes to shew that Ceylon was not the place for him to take up his permanent residence. It is true that he did rent a house at Colombo, but a merchant who knew that it might take some little time to establish his new branch of business might, for the sake of comfort, take a house rather than stay at an hotel, without any intention of remaining permanently or for an unlimited period.

Can it be said that this evidence is sufficient to convince me that this born German, who has resided most of his life in Germany and carried on his trade at Hamburg, has now abandoned his country and native home at Hamburg, and has changed from a German merchant into a Ceylon one? I am of opinion that I should be stretching the doctrine of trade domicile to breaking point if I considered such evidence sufficient. And I must consequently decide in this case that there is not sufficient evidence before me to shew that there was any intention on the part of Karl Festin to remain an unlimited time at Colombo or that he had any intention of acquiring a new domicile, and that the old domicile—namely, that of Hamburg—remains, and

that in fact he has not acquired a trade domicile in Colombo (Ceylon).

Having decided this point in the way I have, there is no need for me to decide the question of whether or not the property has passed technically from Karl Festin carrying on business in Colombo to himself as Karl Festin of Hamburg. The release is therefore refused, and the claim struck out, and an order made for confiscation and sale with liberty to apply.<sup>1</sup>

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(1) See note, *ante*, p. 122.

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[IN H.B.M. SUPREME COURT FOR EGYPT. IN PRIZE.]

(*Sitting at Alexandria.*)

GRAIN, J. July 6, 1915.

### THE LUTZOW. THE KOERBER.

*Cargo—Germans Carrying on Business in China—Extra-territorial Jurisdiction—Non-acquisition of Trade Domicile.*

*A commercial domicile cannot be established by a person resident and carrying on business in a foreign country if the nation of which he is a subject has been granted the privilege of extra-territorial jurisdiction in that country.*

These were two suits, tried together, for the condemnation of goods shipped by German merchants in China on board two German vessels, which were seized in the Suez Canal. It was claimed that the goods should not be treated as enemy property because the owners had a commercial domicile in a neutral country. The facts and arguments appear in the judgment. . . . .

A. Preston (*H.M. Procurator-General*), for the Crown.

G. A. W. Booth and A. Alexander, for the claimants.

GRAIN, J.—In these two cases, the question of law being the same in each case, they are being taken together.

The cargo in the first case was shipped from Hamburg in the s.s. *Lutzow* on July 1, 1914, and consigned to Messrs. Kirchner & Boger, a firm consisting of German subjects residing in Shanghai (China), who for over forty years have carried on business there.

The second case consists of cargo shipped by Wendt & Co., a German firm carrying on business in Hong-Kong, in the s.s. *Koerber* from Canton to an enemy port.

The question of law which arises in both these cases is whether it is possible to establish a commercial or trade domicile in countries which have granted extra-territorial authority to other foreign Powers.

Counsel who appear on behalf of the claimants argue that, although it may be impossible to establish a civil domicile, it is nevertheless possible to establish a commercial one. They contend that there is a difference between a civil domicile and a commercial one; that a commercial or trade domicile is a question of taking steps *animo removendi* to abandon a former domicile, and *animo manendi* to acquire a new one; that it does not depend on nationality, nor even on what in fact is the real domicile, but on the place or places in which the business or businesses is being carried on; that, on the other hand, civil domicile is a question of origin and nationality.

In support of this view they cite passages from *Westlake's Private International Law* (4th ed.), pp. 336, 337, 346, 347, *HODGSON v. BEAUCHESNE* [1858] (12 Moo. P.C. 285, at p. 313), *THE JONGE KLASSINA* [1804] (5 C. Rob. 297, at p. 302; 1 Eng. P.C. 485), *JANSON v. DRIEFONTEIN CONSOLIDATED MINES* ([1902] A.C. 484, at p. 505), *WELLS v. WILLIAMS* [1697] (1 Raym. 282), and *BELL v. KENNEDY* [1868] (L. R. 1 S. & D. 307, *per* Lord Westbury at p. 320).

It has already been decided in this Court by the President that a German cannot establish a domicile in Shanghai—*THE DERFFLINGER* (No. 1) (*ante*, p. 386)—but on that occasion the matter was only argued generally, and the point that there is a difference between civil and commercial domicile was not argued. Therefore I think that, instead of merely following that decision, I ought to give judgment on this point which has been raised before me.

Dicey, in his *Conflict of Laws* (2nd ed. 1908), defines civil and commercial domicile as follows: "A civil domicil is such

a permanent resident in a country as makes that country a person's home, and renders it, therefore, reasonable that his civil rights should in many instances be determined by the laws thereof.

"A commercial domicile, on the other hand, is such residence in a country for the purpose of trading there as makes a person's trade or business contribute to or form part of the resources of such country, and renders it, therefore, reasonable that his hostile, friendly, or neutral character should be determined by reference to the character of such country" (p. 742).

It is clear from the cases *MALTASS v. MALTASS* [1844] (1 Rob. Ecc. Cas. 67), *TOOTAL'S TRUST, In re* [1883] (23 Ch. D. 532), and *ABD-UL-MESSIH v. FARRA* [1888] (13 App. Cas. 431) that in British law a civil domicile cannot be established in countries where extra-territoriality runs.

But this principle has not been followed in the American Courts, as in the case of *MATHER v. CUNNINGHAM* [1909] (American Journal of International Law, vol. iv. p. 446; 74 Atlantic Reporter, 809), which came before the Chief Justice and five other Judges sitting in the Supreme Judicial Court of Maine, the Court decided that an American subject had acquired a domicile of choice in Shanghai (China).

In the course of a very lengthy judgment Mr. Justice Spear points out that the English cases cited as authorities for this doctrine are not really so, as they were all decisions on some particular facts, and not on the doctrine of immiscibility generally, and he quotes Dr. Lushington's judgment in *MALTASS v. MALTMASS* (1 Rob. Ecc. Cas. 67), in which he says, "I give no opinion, therefore, whether a British subject can or cannot acquire a Turkish domicile." But Dr. Lushington does proceed to say, "but this I must say: I think every presumption is against the intention of British Christian subjects voluntarily becoming domiciled in the Dominions of the Porte" (1 Rob. Ecc. Cas., at p. 80).

Counsel for the claimants have pointed out to me that Lord Justice Chitty, in his judgment in *TOOTAL'S TRUST, In re* (23 Ch. D. 532), when speaking of British domicile in Shanghai, states: "There may be a commercial domicile there in times of war with reference to the law of capture, but that is altogether a different matter"—that is, from civil domicile; but in making this statement the Lord Justice merely meant that

the question of commercial domicile was not being argued before him, and he gave no opinion on that question.

Hall, in his *Foreign Jurisdiction of the British Crown*, while practically admitting that the doctrine of immiscibility is upheld by the British Courts, suggests that it ought to be altered. "It is perhaps to be regretted that a change in the law is not made. . . . Anglo Oriental domicile has its reasonable, it may almost be said its natural place"; and later: "There is also every reason for avoiding very grave difficulties of another kind, which are opened through invariable preservation of the domicile of origin. . . . As no domicile can be acquired in an Anglo Oriental Community, &c." (pp. 184 and 185).

It appears to me that the main issue that we are striving after in these applications for the release of prize cargo is, Has the enemy owner of cargo so purged himself of his enemy character as to be allowed to have his goods restored to him? And that appears to be the essence of the two definitions of Dicey. To take Dicey's definition of commercial domicile, can it be said that a person who pays no taxes to the country in which he is living, is more or less beyond the civil control of the country, whose conduct is regulated by his own judicial Courts, who only pays such duty on imports and exports as have been arranged by treaty with his own State, and who in some extra-territorial countries cannot own the smallest parcel of land—can it be said that he is a person "whose trade or business contributes to or forms part of the resources of such country and renders it, therefore, reasonable that his hostile, friendly or neutral character should be determined by reference to the character of such country"?

Again, can such person come within the words of the judgment of the Supreme Court in *THE VENUS* [1814] (8 Cranch, 253, at p. 282; Scott's Cases on Int. Law, at p. 595)—namely, that "they were bound by such residence to the Society of which they were members, subject to the laws of the State, and owing a qualified allegiance thereto; they are obliged to defend it in return for the protection it affords them and the privilege which the laws bestow upon them as subjects. The property of such person, equally with that of the native subjects in their totality, is to be considered as the goods of the nation in regard to other States." It is true that this is a statement with regard to civil domicile, but it does appear to me that there is so

slight a difference, as regards the present issue between the civil and commercial, that the same argument may, to a considerable extent, apply to the commercial domicile, because, as I have already said, what is necessary to arrive at is something that wipes out the enemy character.

I now come to the cases with regard to the establishment of factories in the Eastern countries in the eighteenth century. And these cases do appear to put it beyond doubt that in British law neither a civil nor commercial domicile can be established in an extra-territorial country. No doubt all these cases which I am about to cite were with regard to factories established in the East, and not with reference to the law of extra-territoriality, but the principle for the purposes of argument is practically the same.

In *THE TWEE VRIENDEN* (Lords, July 12, 1784), a Mr. Fremeaux, a merchant carrying on trade at Smyrna under the protection of the Dutch Consul there, was held to be a Dutchman, and his ship and cargo were condemned as Dutch property by the British Prize Court. In *THE RACHAEL MOBURECH* (Lords, May 10, 1792), a Jew living under Dutch protection on the Coast of Malabar, under the sovereignty of the Rajah of Cochin, was held by the Lords of Appeal to be a Dutchman and an enemy. In *THE ETRUSCO* (Lords, December 8, 1798) it was held that if an individual, although not a Frenchman, continued to trade under the French protection in China he must be considered to be a Frenchman.

These cases, although decided with regard to factories, appear to me to be still in point, because the treaties of the present day granting extra-territoriality are merely an enlargement of the privileges granted in earlier days to the factories.

In *THE INDIAN CHIEF* [1800] (3 C. Rob. 12; 1 Eng. P.C. 251) Sir William Scott (Lord Stowell) also lays it down generally that domicile cannot be acquired in an extra-territorial country; but he may have been thinking only of a civil domicile, and so I have not quoted from that judgment; but the other judgments appear so obviously cases of mere trading as to be directly in point in the present cases.

Although I have been much impressed by the judgment in *MATHER v. CUNNINGHAM* (American Journal of International Law, vol. iv. p. 446; 74 Atlantic Reporter, 809), and the review of the British cases in that judgment, nevertheless I am of opinion



that at the present time the British law is that neither a civil nor a commercial domicile can be established by an individual who is resident or carrying on business in a foreign land when his country has been granted the privileges of extra-territoriality.<sup>1</sup>

[Order. Confiscation and sale. Admission of appeal granted. One month to find security 250*l*. Stay of execution refused.]

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(1) See note, *ante*, p. 122.

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[IN H.B.M. SUPREME COURT FOR EGYPT. IN PRIZE.]

(Sitting at Alexandria.)

GRAIN, J. Sept. 18, 1915.

### THE LUTZOW (No. 2).

*Cargo—Passing of Property—Delivery of Documents against Acceptance — Incomplete Acceptance — Delivery of Documents before Acceptance—Effect.*

*Goods were shipped by a German firm at Hamburg to a Japanese firm at Tokio, the terms of the contract being delivery of the documents against acceptance of the sellers' draft. The sellers drew on the London agency of a German bank for the account of the buyers, and the draft was marked for acceptance at the bank three days before the outbreak of war. The bank then parted with the documents to the agents of the consignees. Owing to the outbreak of war the acceptance was never completed:—Held, that the property in the goods had not passed to the consignees, and the goods must be condemned as enemy property.*

This was a suit for the condemnation of three cases of woollen goods on board the German steamship *Lutzow*, which was seized as prize at Port Said. The goods were claimed as

the property of the consignees, Messrs. Kaneko & Co., of Tokio. The facts appear from the judgment.

A. Preston (*H.M. Procurator-General*), for the Crown.

G. A. W. Booth, for the claimants.

GRAIN, J.—The goods in this matter, three cases of woollen goods, were shipped by H. Vogelsang & Co., a German firm at Hamburg, on board the s.s. *Lutzow* for Tokio, *via* Yokohama, on or about July 13, 1914. The consignees were Messrs. Kaneko & Co., of Tokio, and the contract one of documents against acceptance. Messrs. Vogelsang & Co. drew on the Deutsche Bank (London agency) for the account of Messrs. Kaneko & Co., and in the ordinary course, had not war broken out, the draft would have been accepted by the Deutsche Bank on or about August 1, 1914.

What did happen I had better state in the words of the Deutsche Bank themselves, contained in a letter put in and dated July 15, 1915:

The draft for 130*l.* 10*s.* 5*d.* “came into our hands on the 1st August, 1914. Draft and documents were examined in the usual way and when found in order the draft was marked for acceptance *i.e.* initialled for acceptance by the official who is responsible for this class of transaction. The acceptance formula was placed on the bill and signed by two officials on the same day, the 1st of August. Under ordinary circumstances this acceptance would have been completed by delivery to the holders on the following working day, Tuesday the 4th August. Owing to the fact, however, that the days following the 3rd August had been declared bank holidays and that our bank had been closed by order of the British Government when war had broken out, delivery of the draft could not take place. Shortly afterwards we were granted a license by H.M. Government for certain transactions, but we were not allowed to complete the acceptance of any drafts which had been presented on the 1st August.

“We therefore had to cancel the acceptance formula and the signatures on the bills, but have no record of when this was done.” And in another letter they say, “we were not permitted to complete the acceptance by handing over the bill to the holders.”

It also appears from the correspondence that the Deutsche Bank, somewhat foolishly, parted with all the documents before the acceptance was complete—namely, on August 1, 1914—when they merely marked the bill for acceptance, on which date they forwarded all the documents to the Sumitomo Bank, who in due course remitted to the Deutsche Bank the necessary cover.

Counsel for the claimants urges that the property in these goods passed to the consignees, Messrs. Kaneko & Co., when the bill was marked on the face of it as accepted. The bill is produced, and bears on the face of it a stamp: "Accepted 1 August, 1914, payable at the National Provincial Bank of England, Deutsche Bank (Berlin) London Agency, by sub-Manager." This had been signed by two persons, but later the signatures and the stamped words have all been struck out in pen and ink.

I cannot accept the contention of the claimants, because, before the property can pass, the acceptance must be completed. And the liability of the acceptor, though irrevocable when complete, does not arise until then. If this acceptance had been complete, it would have passed the property. Nevertheless, it is not complete by the mere writing of a name, but upon the subsequent delivery of the bill, or upon communication to, or according to the directions of, the person entitled to the bill that it has been accepted. In this particular case all that had happened was that a name had been written on the bill; and, as the claimants themselves say in one of their letters, "we were not permitted to complete the acceptance by handing over the bill to the holders," and so, as they state, they struck out and cancelled the stamped formula of acceptances and the signatures already stamped and written on the face of the bill.

Therefore, no complete acceptance having taken place, the property in the goods has not passed to the consignees, but remains in the consignors, the enemy firm of Vogelsang & Co., of Hamburg, and the order of the Court will be one for confiscation and sale.

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[*Reported by Norman Bentwich, Esq., Barrister-at-Law.*]

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[IN THE PRIVY COUNCIL.]

LORD MERSEY, LORD PARKER, LORD SUMNER, LORD PARMOOR,  
SIR E. BARTON.

July 21, 22, 26, 28. Nov. 10, 1915.

## THE ROUMANIAN.

*Prize Jurisdiction—Enemy Goods in British Ship—Cargo of Oil—Discharge into Tanks—Seizure.*

*Enemy goods on British ships, whether on board at the commencement of the hostilities or loaded during the hostilities, are liable to be seized as prize either on the high seas or in the ports or harbours of the realm.*

*A cargo of oil belonging to an enemy on a British ship, brought into a British port and pumped for safe custody into tanks on shore, may be lawfully seized as prize in such tanks, and the delivery of a letter from the Custom House authorities, addressed to the master, stating that the cargo is placed under detention, is an effectual seizure.*

THE OOSTER EEMS [1784] (1 C. Rob. 284n.; 1 Eng. P.C. 136n.) disapproved and not followed.

*Judgment of the PRIZE COURT (ante, p. 75) affirmed.*

Appeal from a judgment of Sir Samuel Evans (President), sitting in the Prize Court.

Before the outbreak of war, on August 4, 1914, between Great Britain and Germany a cargo of oil, belonging to a German incorporated company, was shipped at a port in America on board the British steamship *Roumanian* for delivery at Hamburg. When the ship had reached the English Channel on her voyage to Hamburg the master received instructions from the owners to proceed to Dartmouth for orders, and thence was ordered to proceed to London. He arrived at Purfleet, and began to discharge the oil into tanks there. The tanks were between 100 and 150 yards from the wharf, and were used in conjunction with the wharf for dealing with cargoes of oil. The oil was discharged by means of the ship's pumps and connecting pipes. Before the discharge was completed a letter

was received from the Custom House informing the master that the cargo was placed under detention.

The facts, which were not in dispute, are set out more fully in the judgment of their Lordships.

In a cause for the condemnation of the cargo as prize and droits of Admiralty, Sir S. Evans held that the case was within the jurisdiction of the Prize Court; that the oil in the tanks was seized in port; and that the Customs notice was a good seizure.

The owners of the cargo appealed.

*Maurice Hill, K.C., R. H. Balloch, and C. Robertson Dunlop*, for the appellants.—These goods were not the subject of prize; they were not at sea nor in port. "In port" means afloat in port, and these goods were on land, not in the custody of the ship, but of the tank company. The possession of warehouseman is not the possession of the shipowner. Further, there is a question if these tanks were within the Port of London at all. The case of *THE REBECKAH* [1799] (1 C. Rob. 227) shews how the Order of 1665 defining Admiralty droit has been construed by usage. *Hale's De Portibus Maris*, c. ii. (*Hargreave's Law Tracts*, pp. 46, 47, 48), defines "ports." An embargo affects ships and goods on board them; there is no case in which enemies' goods on land have been affected. They are subject to the common law Courts, and the Prize Court has no jurisdiction over them. The Orders of August 5, 1914, and the forms under them, mention nothing applicable to this case. The right of the Crown is to take goods afloat. When landed they are in the same position as other enemies' goods in the country—see the passage from Dana's edition of *Wheaton's International Law*, cited in the judgment in *THE MIRAMICHI* (*ante*, p. 137, at pp. 148, 149); see also *Oppenheim's International Law*, vol. 2, p. 182; Pratt's edition of *Story's Notes on the Principles and Practice of Prize Courts*, p. 28; and *Westlake's International Law*, Part II. p. 145. In all these authorities the difference between the treatment of private property on land and private property at sea is pointed out. The only two cases directly in point are *THE OOSTER EEMS* [1784] (1 C. Rob. 284*n.*; 1 Eng. P.C. 136*n.*) and *THE TWO FRIENDS* [1799] (1 C. Rob. 271; 1 Eng. P.C. 130). The oil was property seized on British territory, and is not the subject of prize jurisdiction. It was

not captured as cargo—*THE HOFFNUNG* (No. 3) [1807] (6 C. Rob. 383; 1 Eng. P.C. 583), *THE CHARLOTTE* [1808] (6 C. Rob. 386n.; 1 Eng. P.C. 585n.), and *BROWN v. THE UNITED STATES* [1814] (8 Cranch, 110). The cases in Rothery's MS. report,<sup>1</sup> referred to in the judgment, *THE MARY ANNE* and others, do not warrant the inferences drawn from them—see also the case of *1,253 BAGS AND 103 CASKS OF RICE* [1862] (1 Blatch. U.S. P.C. 211) and *MRS. ALEXANDER'S COTTON* [1864] (2 Wall. U.S. Sup. Ct. Rep. 404). The case of *THE THALIA* [1905] (2 Russ. & Jap. P.C. 116) depended on the special circumstances of the case. The jurisdiction of the Prize Court over goods captured on land is limited to public property so captured by a naval expedition—see *LINDO v. RODNEY* [1782] (2 Dougl. 613n.), cited in *LE CAUX v. EDEN* [1781] (2 Dougl. 594), and the case of the *CANARY MERCHANT* [1742] (cited 2 Dougl. 606 in argument). Further, goods shipped on board a British ship before the outbreak of war, and without any anticipation of such outbreak, are not the subject of prize. The point was not raised by *THE VENUS* (Rothery's MS). There is no case on the point, and if it had been the practice some cases dealing with it must have found their way into the reports. The flag protects the goods, and does not confiscate them. An enemy's ship is enemy territory, but a British ship is not. See *Westlake's International Law*, vol. 2, p. 145: "enemy ships and enemy goods on board are the only enemy property which, as such, is capturable at sea." See also Lawrence, *International Law*, p. 461; *Cohen on the Declaration of London*, p. 139; *Taylor's International Law*, p. 723; Bentwich, *War and Private Property*, p. 79; and Wehberg, *Capture in War on Land and Sea*, p. 68. *THE CONQUEROR* [1800] (2 C. Rob. 303) was a case of a shipment after the outbreak of war, and *THE MASHONA* [1900] (17 Cape of Good Hope Rep. 135) was a case of trading with the enemy. The Board of Trade Notice of August 15, 1914, is not applicable to such a case, and there is no trace of it in any of the emergency legislation or regulations. *THE JUNO* (*ante*, p. 151) was the first case in which the point was raised.

*The Attorney-General (Sir Edward Carson, K.C.), Sir Erle*

(1) See *Prize Droits*, by H. C. Rothery, C.B., Registrar of the High Court of Admiralty, 1853-1878 (revised and annotated by E. S. Roscoe, 1915), pp. 125, 126.

*Richards, K.C.*, and *Theobald Mathew*, for the respondent, the Procurator-General, were not called upon.

Their Lordships took time to consider their judgment.

Nov. 10.—LORD PARKER.—This appeal relates to the cargo *ex* steamship *Roumanian*. The relevant facts are quite simple, and are not in dispute.

The *Roumanian* is a British ship, and on August 4, 1914, the day on which war broke out between this country and Germany, was on a voyage from Port Arthur (Texas) to Hamburg with a cargo of some 6,264 tons of petroleum belonging to the Europäische Petroleum Union, a German company. On the same day the Admiralty, through the secretary of Lloyds, suggested to the owners that the ship should be diverted to some port in the United Kingdom, and the owners accordingly instructed the master to proceed to Dartmouth for orders. The ship arrived at Dartmouth on August 14, 1914.

On August 15 the Board of Trade issued a notice containing recommendations with regard to the treatment of cargoes belonging to an enemy in ships diverted from their original ports of destination. These recommendations appear to their Lordships to be so conceived as in no way to prejudice the liability (if any) of such cargoes to be seized as prize. It was recommended that the cargo should be landed at a dock, legal quay, or sufferance wharf, either in the port at which the steamer had arrived or in some other safe port, and warehoused subject to shipowners' and other charges until sale or disposal could be arranged for. If sold, the proceeds should be held for subsequent distribution to those entitled to the cargo, subject to shipowners' and other charges which might at law have priority over the claims of the persons entitled to the cargo or its proceeds. Obviously, if the cargo were liable to seizure as prize, seizure followed by condemnation in the Prize Court would entitle the Crown either to the cargo itself or to the proceeds thereof, subject to such shipowners' or other charges as might by law take precedence of the Crown's interest.

On August 20 the *Roumanian* proceeded to London, arriving at Purfleet at noon on August 21. Before her arrival arrangements had been made to warehouse the petroleum in the tanks of the British Petroleum Co., Lim., at Purfleet, and permission

had been obtained from the Custom House authorities for its discharge into these tanks. When so discharged the petroleum would be in the custody of the Custom House authorities in the sense that it could not be removed therefrom without their sanction.

The work of discharge accordingly commenced at 12.15 P.M. on August 21, the petroleum being pumped into the tanks, which were situated some 100 to 150 yards from the wharf at which the vessel lay. Meanwhile the Custom House authorities took samples in order to test the specific gravity of the oil and ascertain whether or not it was dutiable.

About 7 P.M. on August 22 a letter from the Custom House at Gravesend was delivered on board the *Roumanian*, addressed to the master, stating that the cargo of about 6,264 tons of petroleum was placed under detention. This letter was not received by the master till 11 P.M. Roughly speaking, about 1,140 tons of oil remained undischarged at 7 P.M. and 570 tons at 11 P.M. on August 22. Notwithstanding the letter above referred to, the work of discharging the oil continued. It was completed long before the writ in these proceedings, which did not issue until September 19, and was served by affixing the same to the tanks in which the petroleum was then warehoused.

It will be observed that the letter giving notice of the detention of the cargo did not refer to its detention as prize, and it was accordingly argued on behalf of the appellants that there was no effectual seizure as prize until the writ in these proceedings was affixed to the tanks containing the petroleum. It is clear, however, that the Custom House is the proper authority to seize or detain, with a view to its condemnation as prize, any enemy property found in a British port. It is equally clear that the letter in question was intended to operate, and must have been understood by all concerned as intended to operate, as such a seizure. No other possible intention was suggested. Under these circumstances their Lordships are of opinion that the cargo was effectually seized as prize upon the delivery of the letter. The point, however, is of little importance in the view which their Lordships take of the points of law which will be dealt with presently, for if there was no seizure by delivery of the letter there was admittedly a good seizure when the writ was served.

Under these circumstances three points were raised by counsel for the appellants.



They contended, first, that, so far as the petroleum was not afloat at the date of seizure, the Prize Court had no jurisdiction; secondly, that even if the Prize Court had jurisdiction, it ought not to have condemned the petroleum so far as at the date of seizure it was warehoused in the tanks of the British Petroleum Co., Lim., and no longer on board the *Roumanian*; and thirdly, that enemy goods on British ships at the commencement of hostilities either never were or, at any rate, have long ceased to be liable to seizure at all.

Obviously, if the last point is correct, it is unnecessary to decide the first two points. Their Lordships, therefore, think it desirable to deal with it at once.

The contention that enemy goods on British ships at the commencement of hostilities are not the subject of maritime prize was not argued before the President in the present case. It had already been decided by him in *THE MIRAMICHI* (*ante*, p. 137). Their Lordships have considered carefully the judgment of the President in the last-mentioned case, and entirely agree with it. The appellants' counsel based their contention on three arguments. First, they relied on the dearth of reported cases in which enemy goods on British ships at the commencement of hostilities have been condemned as prize, emphasising the fact that in the case of *THE JUNO* (*ante*, p. 151) no authority could be found for the right of the master of a British ship on which enemy goods were seized as prize to compensation in lieu of freight, though, if such goods were properly the subject of prize, the question must constantly have arisen. Secondly, they laid stress on certain general statements contained in textbooks on international law as to what enemy goods can now be seized as prize. Thirdly, they called in aid that part of the Declaration of Paris which affords protection to enemy goods other than contraband on neutral ships and the principle underlying or supposed to underlie such Declaration.

With regard to the dearth of reported decisions, it is to be observed that the plainer a proposition of law the more difficult it sometimes is to find a decision actually in point. Counsel are not in the habit of advancing arguments which they think untenable, nor, as a general rule, do cases in which no point of law is raised and decided find their way into law reports. If, on the one hand, it be difficult to find a case in which enemy goods on British

ships at the commencement of hostilities have been condemned as prize, it is, on the other hand, quite certain that no case can be found in which such goods have been held immune from seizure. Further, inasmuch as by international comity British Prize Courts have in general extended to neutrals the privileges enjoyed by British subjects, we should, if this contention be correct, expect to find that enemy goods on neutral ships at the commencement of hostilities were alike immune from seizure. Their Lordships have been unable to find any authority which gives colour to this suggestion. There appears, indeed, to be no case in which for this purpose any distinction has been drawn between goods on board a neutral vessel at the outbreak of hostilities and goods embarked on a neutral vessel during the course of a war.

Their Lordships, therefore, are not impressed by the argument based on the dearth of actual decisions on the point. Moreover, the decisions, such as they are, certainly do not support, but, indeed, contradict the appellants' contention. It is clear, from the cases cited in *THE MIRAMICHI* (*ante*, p. 137), that enemy goods embarked on British ships during the hostilities are the subject of prize; see in particular *THE CONQUEROR* (2 C. Rob. 303). In these cases the sole question decided has been the enemy character of the goods, and no stress has been laid on the time at which they were embarked or on whether any person concerned had or had not been guilty of the common law offence of trading with the enemy. Further, there is the case of *THE VENUS*, referred to in Rothery's *Prize Droits* at p. 129.

Their Lordships have thought it desirable to examine the papers preserved in the Record Office in connection with this case, the facts of which are as follows: *THE VENUS* (Rothery's MS.) was a British ship which at the outbreak of hostilities was on a voyage to Hamburg. Its cargo had been shipped at Genoa, Ancona, and Mentone. The master, hearing of the outbreak of war and desiring to avoid the risk of his ship being captured by the enemy, put into Plymouth. The Receiver of Admiralty droits at Plymouth, suspecting upon information given by the master that part of the cargo belonged to enemy subjects, seized both ship and cargo. The shipowners put in a claim for the release of the ship on the ground that it was British, and also for freight, expenses, and demurrage. The

ship was ordered to be released. The claim for freight and expenses was allowed, there being a reference to the Proctor to ascertain the proper amount, which was declared a charge on the cargo. The claim for demurrage was disallowed. The amount to be allowed for freight and expenses was in due course certified by the Proctor, and apparently paid out of the proceeds of the cargo which had been appraised and sold under the direction of the Court. Parts of the cargo or its proceeds were subsequently claimed by, and released in favour of, neutrals. The residue of the cargo was condemned as the property of enemy subjects.

The case of *THE VENUS* (Rothery's Prize Droits, 129) appears, therefore, to be an authority against the appellants' contention. They say, truly, that the point does not seem to have been raised; but it is far more likely that the point was not raised because it was thought to be untenable than that the Court overlooked what, according to the appellants' contention, must have been a well-known principle of prize law. Further, *THE VENUS* (Rothery's Prize Droits, 129) is certainly an authority in support of the President's decision in *THE JUNO* (*ante*, p. 151). Curiously enough, the master of the *Venus*, though a British subject, is, in the Proctor's report in the last-mentioned case, referred to as the "neutral master," a fact which is only consistent with the practice of the Court in allowing freight being the same, whether the enemy goods were seized on neutral or on British ships.

With regard to the general statements contained in text-books on international law, it is to be observed that none of those cited in support of the appellants' contention appears to have been based on any discussion of the point in issue. On the contrary, they are for the most part based on a discussion of the effect of the Declaration of Paris. Their Lordships do not think that any useful purpose would be served by examining these statements in detail. They will take one example only, that cited from *Westlake's International Law*, Part II. p. 145. The author has been discussing the effect of the Declaration of Paris, and sums up as follows: "We may therefore conclude that enemy ships and enemy goods on board them are now, by international law, the only enemy property which, as such, is capturable at sea."

In their Lordships' opinion the meaning of such statements must be judged by the context. They cannot be taken, apart from the context, as intended to be an exhaustive definition of what is or is not now the subject of maritime prize. It might just as well be argued that, because the writer in the present case uses the expression "capturable at sea," he must have thought that enemy goods in neutral ships lying in British ports or harbours were, notwithstanding the Declaration of Paris, still subject to capture.

Such statements are in any case more than counterbalanced by statements contained in other well-recognised authorities. Thus, in addition to the passages quoted in *THE MIRAMICHI* (*ante*, p. 137) from Dana's edition of *Wheaton's International Law*, it will be found that Halleck (*International Law*, vol. 2, p. 98) states that whatever bears the character of enemy property (with a few exceptions not material for the purpose of this case), if found upon the ocean or afloat in port, is liable to capture as a lawful prize by the opposite belligerent. It is the enemy character of the goods, and not the nationality of the ship on which they are embarked, or the date of embarkation, which is the criterion of lawful prize. This is in full accordance with Lord Stowell's statement in *THE REBECKAH* (1 C. Rob. 227) of the manner in which the Order of 1665 defining Admiralty droits has been construed by usage.

Passing to the appellants' third argument, that based on the Declaration of Paris or the principle supposed to underlie such Declaration, it may be stated more fully as follows: Enemy goods on neutral territory were never the legitimate subject of maritime prize. Such goods could not be seized without an infringement of the rights of neutrals. The rights of neutrals are similarly infringed if enemy goods be seized on neutral ships, but the law of prize having for the most part been formulated and laid down by nations capable of exercising and able to exercise the pressure of sea power, the rights of neutrals have been ignored to this extent, that the capture of enemy goods in neutral vessels on the high seas or in ports or harbours of the realm has been deemed lawful capture. The Declaration of Paris is in fuller accordance with principle; it recognises that no distinction can be drawn between neutral territory and neutral ships. To use Westlake's expression (*International*

*Law*, Part II. p. 145), it assimilates neutral ships to neutral territory, recognising that on both the authority of the neutral State ought (except possibly in the case of contraband) to be exclusive. So far the argument proceeds logically, but its next step is, in their Lordships' opinion, open to considerable criticism. If, say the appellants, neutral ships are assimilated, as on principle they should be, to neutral territory, British ships ought to be in like manner assimilated to British territory. Whatever may have been the case in earlier times, no one will now contend that the private property of enemy subjects found within the realm at the commencement of a war can be seized and appropriated by the Crown. The same ought, therefore, to hold of enemy goods found in British ships at the commencement of war. This part of the argument is, in their Lordships' opinion, quite fallacious. The Declaration of Paris, in effect, modified the rules of our Prize Courts for the benefit of neutrals. It was based on international comity, and was not intended to modify the law applicable to British ships or British subjects in cases where neutrals were not concerned. Its effect may possibly be summed up by saying that it assimilates neutral ships to neutral territory, but it is impossible to base on this assimilation any argument for the immunity of enemy goods in British ships.

The cases are not *in pari materia*. If the Crown has ceased to exercise its ancient rights of seizing and appropriating the goods of enemy subjects on land, it is because the advantage to be thus gained has been small compared with the injury thereby entailed on private individuals or in order to insure similar treatment of British goods on enemy territory. But one of the greatest advantages of sea power is the ability to cripple an enemy's external trade, and for this reason the Crown's right of seizing and appropriating enemy goods on the high seas, or in territorial waters, or the ports or harbours of the realm, has never been allowed to fall into desuetude. In order to attain this advantage of sea power in the fullest degree our Courts have always upheld the right of seizing such goods, even when in neutral bottoms, and neutrals have always admitted or acquiesced in the exercise of that right, either because it was deemed to be a legitimate exercise of sea power in time of war or because on some future occasion they themselves

might be belligerents and desire to exercise a similar right on their own behalf. Those who were responsible for the Declaration of Paris had not to weigh the advantage to be gained by the seizure of enemy goods on neutral ships against the injury thereby inflicted on private owners, but against the demands of international comity. The fact that we sacrificed on the altar of international comity a considerable part of the advantages incident to power at sea is no legitimate reason for making a further sacrifice where no question of international comity can possibly arise.

Their Lordships hold therefore, on this part of the case, that enemy goods on British ships, whether on board at the commencement of the hostilities or embarked during the hostilities, were always, and still are, liable to be seized as prize, either on the high seas or in the ports or harbours of the realm. It follows that the petroleum seized on board the *Roumanian* was properly condemned as prize.

The next point to be considered is the jurisdiction of the Prize Court so far as the petroleum in question was, when seized as prize, warehoused in the tanks of the British Petroleum Co., Lim., and no longer on board the *Roumanian*. The appellants contended that it is the local situation of the goods seized as prize which determines the jurisdiction of the Prize Court. If such goods be, at the time of seizure, on land, and not afloat, it is not, they contended, the Prize Court, but some Court of common law, which has jurisdiction to determine the rights of all parties interested. In their Lordships' opinion this contention also fails. The chief function of a Court of Prize is to determine the question, "prize or no prize"; in other words, whether the goods seized as prize were lawfully so seized, so as to raise a title in the Crown. In determining this question the local situation of the goods at the time of seizure may be of importance; but it is the seizure as prize, and not the local situation of the goods seized, which confers jurisdiction. If authority be needed for this proposition, it may be found in Lord Mansfield's judgment in the case of *LINDO v. RODNEY*, reported in a note to *LE CAUX v. EDEN*, (2 Dougl. 594, at p. 612). It must be remembered that the jurisdiction of the Prize Court is based in every case upon a commission under the Great Seal. Lord Mansfield pointed out that, in the case before him, the

commission under which the Court derived jurisdiction conferred jurisdiction in all cases of prize, whether the goods sought to be condemned were taken on land or afloat. The same may be said of the commission in the present case. In his opinion, however, it was necessary to draw a distinction in this connection between the jurisdiction of the Court of Admiralty as a Court of Prize and its jurisdiction apart from the commission which constitutes it a Court of Prize. To give the Court of Admiralty, as such, jurisdiction, the matter complained of must have occurred on the high seas; but in all matters of prize it was not the Court of Admiralty as such, but the Court of Admiralty, by virtue of the commission, which had jurisdiction, and this jurisdiction was exclusive, whether the goods seized as prize were on land or afloat. The only authority which, at first sight, appears to be in conflict with Lord Mansfield's decision is the case of *THE OOSTER EEMS* (1 C. Rob. 284*n.*; 1 Eng. P.C. 136*n.*), to which, for the reasons hereinafter mentioned, no great weight can be given.

Their Lordships will now proceed to consider the appellants' contention that, even if the Prize Court had jurisdiction, it ought, nevertheless, to have decided against the condemnation of the petroleum in question, so far as it was not actually afloat on board the *Roumanian* at the time of seizure. They admitted that during the war no order for restitution or release could properly be made in favour of the German owners, but they suggested that the proper course was to hand the petroleum over to the Public Trustee or some other official for safe custody until the restoration of peace. No case where any such course has been pursued was cited.

The real question is whether the petroleum in question is, according to the law administered by Prize Courts in this country, properly the subject of maritime prize, although locally situated on shore. All enemy ships and cargoes which may, after the outbreak of the war, be found afloat on the high seas or in territorial waters or in the ports or harbours of the realm are liable to seizure as maritime prize. The petroleum in question was undoubtedly enemy property. It was undoubtedly on the high seas at and after the declaration of war. It became liable to seizure as prize as soon as war was declared. It did not cease to be so liable by being carried into Dartmouth or thence

to Purfleet. It clearly remained so liable while still afloat. Did it cease to be so liable when pumped into the tanks of the British Petroleum Co., Lim.? In the course of the argument counsel were asked to suggest some intelligible reason why it should cease to be so liable. No satisfactory reason was suggested, and their Lordships have been unable to discover one for themselves. The argument of counsel was based on the assumption that no enemy goods not actually afloat at the time of seizure could be lawfully seized as prize unless possibly they could be considered as locally situate within a port or harbour, and that the tanks of the British Petroleum Co., Lim., could not be considered as part of the Port of London. There is, in their Lordships' opinion, no ground for this assumption. The test of ashore or afloat is no infallible test as to whether goods can or can not be lawfully seized as maritime prize. It is perfectly clear, for instance, that enemy goods seized on enemy territory by the naval forces of the Crown may lawfully be condemned as prize.

The same is true of goods seized by persons holding letters of marque, and even of goods seized by persons having no authority whatever on behalf of the Crown, when the Crown subsequently ratifies the seizure. This is clear from the case of *BROWN AND BURTON v. FRANKLYN* [1698] (Carth. 474), quoted in Lord Mansfield's judgment above referred to. Brown and Burton, the masters of a vessel belonging to the East India Co., seized enemy goods on land. They had no letters of marque. The King's Proctor instituted proceedings in the Prize Court, and, having obtained a condemnation of the property as prize, proceeded against Brown and Burton for an account. The latter instituted proceedings at common law for a prohibition on the ground that the goods taken were on land, but relief was refused. Moreover, Lord Mansfield, in *LINDO v. RODNEY* (2 Dougl. 612n.), expressly approves an admission made by counsel in that case to the effect that it would be "spinning very nicely" to contend that if the enemy left their ship and got on shore with money, and were followed on land and stripped of their money, this would not be a lawful maritime prize. If this be, as it seems to their Lordships to be, good law, the present is an *a fortiori* case. In the case put by counsel the landing of the goods was made by the enemy with



the object of escaping capture afloat. In the present case such landing was by British subjects, who had the enemy goods in their possession and did not know what else to do with them, and were pursuing a course recommended by the Board of Trade, and in no way intended to prejudice the Crown's rights.

With regard to the authorities quoted in this connection, they have, in their Lordships' opinion, with one possible exception, no real bearing on the point. In *THE HOFFNUNG* (No. 3) (6 C. Rob. 383; 1 Eng. P.C. 583) the cargo seized on shore had been landed and sold prior to the declaration of war. These goods, therefore, even if enemy goods at all, were never liable to seizure as prize. They were not in fact seized, nor was any proceeding taken against them, but an attempt was made to recover, against the ship which had brought them, the value of the goods so sold, the ship itself belonging to a neutral. This claim was rejected by the Court. It was held that unless it could be shewn that the hand of capture had been employed on these goods in the quality of cargo the Court could not go back to affect them in any other character. The same principle was recognised in *THE CHARLOTTE* (6 C. Rob. 386n.; 1 Eng. P.C. 585n.), in which it was held that the proceeds of goods landed and sold prior to the seizure of the ship, and never themselves seized, were not amenable to the jurisdiction of the Court.

In *BROWN v. THE UNITED STATES* (8 Cranch, 110) it was decided on the facts that the goods in question were in the position of enemy goods found on American soil at the commencement of the hostilities, and not, therefore, the subject of maritime prize. That case, therefore, is clearly distinguishable from the present.

The only case which raises any difficulty is that of *THE OOSTER EEMS* (1 C. Rob. 284n.; 1 Eng. P.C. 136n.). There is no satisfactory report of this case. It is mentioned in the note on page 284 of 1 *C. Robinson's Reports* and in the preface to *Hay and Marriott's Decisions*, p. xxvii. Their Lordships have, however, examined the papers relating to it preserved in the Record Office. The *Ooster Eems* was a Prussian and therefore neutral vessel. It was stranded on the Goodwin Sands on a voyage from Texel to the East Indies. Before it broke up part of its cargo was sent ashore, including some boxes of silver

coin. The latter were deposited by the master with the Prussian Consul at Deal. One Jeremiah Hartley, an officer of the Court of the Cinque Ports, acting under an order of attachment issued by such Court sitting as an Admiralty Court, seized and obtained possession of the goods so landed, including the boxes of silver, on behalf of the Warden of the Cinque Ports. The seizure may have been intended to be a seizure of enemy goods as maritime prize, though their Lordships have been unable to ascertain that the Court of the Cinque Ports had any jurisdiction in prize. The Warden took no proceedings, either in his own or any other Court, with a view to having the goods lawfully condemned. The master therefore obtained from the High Court of Admiralty in England a monition requiring Jeremiah Hartley and the Warden, and all others whom it might concern, to appear and proceed to the legal adjudication in that Court whether the goods seized were lawful prize or not. The King's Proctor subsequently intervened. Certain depositions were filed which appear to raise some suspicion that the goods were Dutch, and therefore enemy goods, but there was no real evidence to that effect. The master deposed that he did not know to whom the goods belonged, and, under these circumstances, one would have expected that the Court would have acted on the presumption arising from the fact that the ship was a neutral ship. The Court, however, made an interlocutory decree condemning the goods on the ground that the goods, which apparently were assumed to be enemy goods, were not at the time of seizure "in a privileged vehicle or on neutral territory."

All questions between the Crown and the Warden were reserved. The master appealed to the Lords Commissioners of Appeal in Prize, and on such appeal the order for condemnation was discharged, not on the merits, but, in the words of the Privy Council Journals, on the ground that "the High Court of Admiralty in England, the Court appealed from, had not a jurisdiction over the goods seized and proceeded against in this cause."

The records of the Privy Council do not contain any note of the reasons which led to this decision. It would appear, however, from the case of *THE TWO FRIENDS* (1 C. Rob. 271; 1 Eng. P.C. 130) that Lord Stowell had before him some note

of these reasons, for he represents Lord Thurlow as saying that "the goods in question had never been taken on the high seas, but had only passed in the way of civil bailment into civil hands, and were afterwards arrested as prize."

If this be correct, it may mean that, in the opinion of the Lords Commissioners, it is the local situation of the goods seized as prize, and not the seizure as prize, which determines the jurisdiction of the Prize Court, a decision diametrically opposed to the judgment of Lord Mansfield in *LINDO v. RODNEY* (2 Dougl. 612n.), which had been pronounced only three years previously. On the other hand, it may mean that the goods in question were not liable to seizure as prize because they were not on the high seas, but on land, in which case Lord Thurlow was deciding the very point which he held the Court of Admiralty had no jurisdiction to decide, and he ought to have ordered the restitution of the goods to the master instead of leaving that somewhat hardly used individual to his remedies at common law, in the assertion of which he would have in some way or other to get over Lord Mansfield's judgment to the effect that prize or no prize could only be determined in a Prize Court.

Moreover, it is almost impossible to suppose, in the then state of the authorities, that Lord Thurlow thought that to constitute lawful prize the seizure must have been on the high seas. It was already well settled that enemy ships and goods in the ports or harbours of the realm were the subject of maritime prize. It was equally well settled that enemy goods on enemy territory seized by the maritime forces of the Crown, or persons having letters of marque, could properly be condemned as prize. If, therefore, he used the expressions attributed to him by Lord Stowell, some other explanation must be found.

In their Lordships' opinion a reasonable explanation of the case and of Lord Thurlow's words may be found in the following consideration. It appears that the Court of the Cinque Ports, in its capacity as an Admiralty Court, had taken possession of the goods at the instance of the Lord Warden. There was, therefore, a matter pending in the Cinque Ports which, so far as their Lordships can discover, was not a Court of Prize. The effect of the monition was to remove this matter to the High Court of Admiralty for trial there. In so trying it the High Court would be exercising an Admiralty, and not a

prize jurisdiction. As appears by Lord Mansfield's judgment in *LINDO v. RODNEY* (2 Dougl. 612*n.*), in order to found an Admiralty jurisdiction, the complaint must be made of something done on the high seas. This explanation would fully account for the words used by Lord Thurlow, though it must be admitted that Lord Stowell took a different view as to what he meant.

In any event their Lordships do not consider that the *OOSTER EEMS* (1 C. Rob. 284*n.*; 1 Eng. P.C. 136*n.*) has any value as an authority. It has never been followed, and apparently has been cited twice only, and in each case distinguished. It is so cited and distinguished in *THE TWO FRIENDS* (1 C. Rob. 271; 1 Eng. P.C. 130), above referred to, and also in *THE PROGRESS*. [1810] (Edw. 210).

In the last-mentioned case certain British ships with their cargoes had been captured by the French. It is not clear whether they were captured at sea and taken into Oporto after the French occupation, or whether the French found them in the harbour of Oporto when they took possession of it. The French appear to have landed part of the cargoes, which was warehoused on shore at the time when the military forces of the Crown took Oporto. It was, however, held upon the fact that there had been a capture by the French, and a recapture by the military forces of the Crown of both ships and cargoes.

Lord Stowell allowed a claim for salvage on the part of the military authorities in respect of that portion of the cargoes which had been landed, as well as of the ships, and that portion of the cargoes remaining on board. He distinguished *THE OOSTER EEMS* (1 C. Rob. 284*n.*; 1 Eng. P.C. 136*n.*) on the ground, as their Lordships understand the decision, that the master of the *Ooster Eems*, in landing the goods, was acting within his authority derived from the owners of the goods, whereas the landing in the case which he was considering had been effected by persons acting without authority from, and contrary to, the interests of the owners. The same ground of distinction would appear to be applicable to the case which their Lordships are considering. The petroleum was not warehoused pursuant to any authority given by the owners, but in breach of the contract for its carriage to Hamburg, and, so far as the owners were concerned, this was as much a hostile

act as the landing of the goods by the enemy captors in the case of *THE PROGRESS* (Edw. Ad. Rep. 210). In neither case, to use Lord Stowell's expression, was the continuity of the character of the goods landed as cargo in any way interrupted.

There are only two other cases which need to be referred to in this connection. The first is that of *THE MARIE ANNE*, cited in Rothery's *Prize Droits* at page 126. In this case, at the outbreak of the war with France on May 16, 1803, the *Marie Anne*, a French ship, was under repair at Ramsgate, and certain parts of her cargo had been landed and were warehoused. Both the ship and the goods so landed were seized as prize, and in due course condemned as such. There is no record of the reasons which influenced the Court. It may be that the warehouses in which the goods were deposited were considered as part of a harbour or port of the realm so as to bring the case within the ordinary definition of goods liable to seizure as prize. It may be that the goods, having been temporarily landed while the vessel was repaired, were still considered as part of the cargo, though not actually on board. The case, however, is clearly inconsistent with the proposition that goods seized on land cannot be lawful prize. The same may be said of the case of *THE BERLIN JOHANNES* (Rothery, 125) if, as would appear to be the case, the goods already landed were seized and condemned as prize.

If these decisions turned on the question whether the goods, though landed, were still in port, they are authorities against the appellants, for no valid distinction can be suggested between a warehouse for the receipt of goods brought into harbour by sea and the tanks in which, in the present case, the petroleum was stored.

Their Lordships, therefore, have come to the conclusion that the petroleum on board the *Roumanian*, having from the time of the declaration of the war onwards been liable to seizure as prize, did not cease to be so liable merely because the owners of the vessel, not being able to fulfil their contract for delivery at Hamburg, pumped it into the tanks of the British Petroleum Co., Lim., for safe custody, and that therefore its seizure as prize was lawful. They see no reason to dissent from the judgment of the President to the effect that these tanks constituted part of the Port of London for the purpose of applying

the rule relating to the liability to seizure of enemy's goods in the ports and harbours of the realm, but it is unnecessary to decide this point.

For the reasons hereinbefore appearing their Lordships are of opinion that the appeal should be dismissed, and they will humbly advise His Majesty accordingly.

*Appeal dismissed.*

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*Solicitors*—Ince, Colt, Ince & Roscoe, for appellants; Treasury Solicitor, for respondent.

[*Reported by C. E. Malden, Esq., Barrister-at-Law.*]

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[IN THE PRIVY COUNCIL.]

LORD MERSEY, LORD PARKER, LORD SUMNER, LORD PARMOOR,  
SIR E. BARTON.

July 19, 20, 21, 28. Nov. 11, 1915.

THE ODESSA. THE WOOLSTON. (*Consolidated Appeals.*)

*Enemy Cargo—Rights of Pledgees—Power of Crown to Exercise Bounty—Civil List Acts (1 Edw. 7. c. 4 & 1 Geo. 5. c. 28).*

*Where an enemy cargo has been properly taken as prize and condemned in the Prize Court holders of the bills of lading, as pledgees, have no claim which the Court will recognise, and their position is not affected by the cargo being shipped in a British ship. But the power of the Crown to exercise bounty by way of redress of hardships still exists and is not affected by the Civil List Acts (1 Edw. 7. c. 4 & 1 Geo. 5. c. 28).*

*Judgment of the PRIZE COURT (ante, p. 163) affirmed.*

The *Odessa* was a German ship, which was captured on August 19, 1914, by one of His Majesty's ships, and was afterwards condemned as prize. The appellants, Messrs. Schröder & Co., a London firm, had made advances against the cargo of

the vessel, which cargo belonged to a German firm at Hamburg, and were holders of the bills of lading as security for their debt. They claimed the cargo as their property as being holders for value of the bills of lading. The facts are set out fully in the judgment of their Lordships.

The facts in the case of the *Woolston* were similar, with the exception that the *Woolston* was a British ship.

The Prize Court decided against the claims of the pledgees, and they appealed from that decision.

*Sir Robert Finlay, K.C., Mackinnon, K.C., and C. Robertson Dunlop*, for the appellants in both cases.—The appellants have a right to these goods and an interest in them which the Prize Court ought to recognise and protect. They were the only persons entitled to the possession of the goods at the time of the capture, and the rule as to enemy cargo does not apply where British subjects appear as indorsees of the bills of lading. As to the position of indorsees of bills of lading, see *SEWELL v. BURDICK* [1884] (54 L. J. Q.B. 156; 10 App. Cas. 74) and *BIDDELL v. CLEMENS HORST & Co.* [1911] (81 L. J. K.B. 42; [1912] A.C. 18). On principle and on the balance of authority the interest of British merchants cannot be confiscated because an enemy might have redeemed the goods, especially since such redemption has been made impossible by the outbreak of war. The Court below followed *THE MARIE GLAESER* (*ante*, p. 38) and *THE MIRAMICHI* (*ante*, p. 137), but those cases are distinct from the present case. Here the appellants appear as indorsees on the bills of lading, and are in possession, with a right to dispose of the goods. They had the beneficial interest, both legal and equitable, and *THE AMY WARWICK* [1862] (2 Sprague's Ad. Rep. 150) shews that a Prize Court will deal with beneficial interests and is really an authority in favour of the appellants; and *THE ST. JOZE INDIANO* [1816] (1 Wheaton, 208), there cited, does not throw much light on the point. *THE TOBAGO* [1804] (5 C. Rob. 218; 1 Eng. P.C. 456) was a case of a bottomry bond, which is a *jus in rem* and not *jus in re*, and is really in favour of the appellants. In *THE FRANCES* [1814] (8 Cranch, 418) the judgment of the majority of the Court does not apply to this case, and the dissenting judgment is in favour of the appellants. In the older cases—*THE MARIANNA* [1805]

(6 C. Rob. 24; 1 Eng. P.C. 518), *THE CONSTANTIA HARLESSEN* [1810] (Edw. 232), and *THE BELVIDERE* [1813] (1 Dods. 353; 2 Eng. P.C. 183)—the question turned upon charges not apparent on the ship's papers—see also *THE AINA* [1854] (Spinks, 8; 2 Eng. P.C. 247), *THE IDA* [1854] (Spinks, 26; 2 Eng. P.C. 268), *THE ABO* [1854] (Spinks, 42; 2 Eng. P.C. 285), and *THE ARIEL* [1857] (11 Moo. P.C. 119; 2 Eng. P.C. 600)—and to apply the doctrine of secret liens to the practice of sending bills to bankers, who accept and pay them and take the bills of lading as security, is an undue extension, as was held by the minority of the Court in *THE CARLOS F. ROSES* [1900] (177 U.S. Rep. 655). *THE HAMPTON* [1866] (5 Wall. 372) was a cost of a mortgage upon the ship, and is distinguishable. The decision of the Court below in fact confiscates the property of British subjects without doing any harm to the enemy, for the interest of the German consignee is negligible. It is an unjust injury to English financial business. Under present circumstances the proceeds of the cargo go into the Consolidated Fund, and cannot be touched by the prerogative, so that the whole position is quite different from that in Lord Stowell's time, and the whole tenor of his judgments shews that they were given under very different circumstances, when the position of the Crown was a material element to be considered. This class of interest did not exist in Lord Stowell's time, and the procedure of the Prize Court can be adjusted to meet altered circumstances. The earlier cases recognise a lien for freight, and the rights of a pledgee are on at least an equal footing—see *BRISTOL AND WEST OF ENGLAND BANK v. MIDLAND RAILWAY* [1891] (61 L. J. Q.B. 115; [1891] 2 Q.B. 653). There is no more difficulty in a case such as this than in cases of freight.

[They also referred to *THE NINGCHOW* (*ante*, p. 288).]

*The Attorney-General* (Sir Edward Carson, K.C.), *Maurice Hill*, K.C., *Theobald Mathew*, and *T. H. Case*, for the respondent, the Procurator-General.—The captor stands in the position of the consignee by a fiction, and the Prize Court gives compensation for freight on general principles of fair dealing. *THE IDA* (Spinks, 26; 2 Eng. P.C. 268) is exactly this case. The appellants were not the owners of the cargo; the ship was an enemy's ship, and therefore the presumption is that the goods were enemy's goods, and against this there is only the fact



that the appellant's name appears in the bills of lading. See *THE PACKET DE BILBOA* [1799] (2 C. Rob. 133; 1 Eng. P.C. 209) as to the question of legal title. There is nothing here to relieve the goods from condemnation. The shipments were made before the war broke out, and transfers *in transitu* are not recognised; but on the appellant's argument this might be got over by a transfer before the *transitus* began. Ownership has always been the test accepted by Prize Courts.

[In addition to the cases cited on behalf of the appellants, they referred to *THE MARY* [1815] (9 Cranch, 126), *THE BATTLE* [1867] (6 Wall. 498), *THE NIGRETIA* [1904] (2 Russ. & Jap. P.C. 208), and *THE ROSSIA* [1904] (2 Russ. & Jap. P.C. 43).]

Further, the power of the Crown to exercise bounty for the redress of hardships is not affected by the Civil List Act, 1910.

*Mackinnon, K.C.*, replied.

At the conclusion of the arguments their Lordships said that they would advise His Majesty to affirm the judgment of the Court below, and would give their reasons at a later date.

Nov. 11.—Their Lordships' reasons were given by

LORD MERSEY.—These are appeals from two judgments of the President of the Probate, Divorce, and Admiralty Division of the High Court of Justice, sitting in Prize.

There is very much in common in the points raised in both cases, but as the facts and arguments are not identical it is desirable to consider each case separately.

#### THE ODESSA.

The facts in this case are as follows: The appellants, Messrs. J. H. Schröder & Co., are bankers carrying on business in London. The partners are Baron Bruno von Schröder, a naturalised British subject, and Frank Tiarks, a natural-born British subject. In the ordinary course of their business the appellants had in March, 1914, agreed with a German company in Hamburg, called the *Rhederei-Actien-Gesellschaft von 1896*, to accept the drafts of Weber & Co., a firm carrying on its business in Chili, for the price of a quantity of nitrate of soda to be sold and shipped by Weber & Co. to the German company.

The drafts were to be drawn at ninety days' sight, and the appellants, upon acceptance of them, were to receive by way of security the bill of lading for the cargo, together with a policy of marine insurance. The consideration for this accommodation was to be a commission of one quarter per cent., payable by the German company to the appellants. In due course Weber & Co. shipped a cargo of nitrate on board a sailing ship called the *Odessa*, belonging to the German company, and took from the captain a bill of lading dated May 8, 1914, in which the voyage was described as from Mejillones (the port of shipment in Chili) to the "Channel for orders," and by it the cargo was made deliverable to the appellants or their assigns. This bill of lading incorporated the terms of a charterparty (of which there is no copy), and made the chartered freight payable by the consignees upon delivery of the cargo. Drafts for a total amount of 41,153*l.* 1*s.* 5*d.* (said to be the full price of the cargo) were drawn by Weber & Co. upon the appellants, and accepted by them on June 9, 1914, they receiving in exchange the bill of lading. War broke out between Great Britain and Germany on August 4, 1914, the *Odessa* being then on her voyage to the Channel. On the 19th the ship was captured on the high seas by H.M.S. *Caronia* and brought into Bantry Bay, and on the 31st a writ was issued against ship and cargo at the suit of the Procurator-General claiming condemnation of both as lawful prize. On September 10 the drafts of Weber & Co. fell due, and were paid by the appellants. The ship was duly condemned, and no question is raised with reference to her condemnation; but in respect of the cargo the appellants intervened, and by their claim alleged it to be their property as holders for full value of the bill of lading therefor, and as British property not liable to condemnation. The case was heard by the learned President on December 7 and 14, 1914, with the result that he condemned the cargo on the ground that the general property was in the German company at the date of the seizure, and that the appellants were merely pledgees, and as such not entitled to any precedence over the Crown.

Their Lordships are of opinion that the learned President was right in the inferences which he drew from the facts—namely, that the general property in the cargo was in the

German company, and that the appellants were merely pledgees thereof at the date of the seizure. This indeed is hardly disputable, having regard to the case of *SEWELL v. BURDICK* (54 L. J. Q.B. 156; 10 App. Cas. 74). The property vested in the company upon the ascertainment of the goods at Mejillones, and the pledge, was perfected when the appellants accepted the drafts and received the bill of lading.

The appellants, indeed, did not dispute the correctness of these inferences, but what they say is that, though correct, they do not justify a decree which has the effect of forfeiting their rights as pledgees. Thus the question in the appeal is whether, in case of a pledge such as existed here, a Court of Prize ought to condemn the cargo, and, if so, whether it should direct the appellants' claim to be paid out of the proceeds to arise from the sale thereof.

It is worth while to recall generally the principles which have hitherto guided British Courts of Prize in dealing with a claim by a captor for condemnation. All civilised nations up to the present time have recognised the right of a belligerent to seize, with a view to condemnation by a competent Court of Prize, enemy ships found on the high seas or in the belligerents' territorial waters and enemy cargoes. But such seizure does not, according to British prize law, affect the ownership of the thing seized. Before that can happen the thing seized, be it ship or goods, must be brought into the possession of a lawfully constituted Court of Prize, and the captor must then ask for and obtain its condemnation as prize. The suit may be initiated by the representative of the capturing State, in this country by the Procurator-General. It is a suit *in rem*, and the function of the Court is to enquire into the national character of the thing seized. If it is found to be of enemy character, the duty of the Court is to condemn it; if not, then to restore it to those entitled to its possession. The question of national character is made to depend upon the ownership at the date of seizure, and is to be determined by evidence. The effect of a condemnation is to divest the enemy subject of his ownership as from the date of the seizure, and to transfer it, as from the date, to the Sovereign or to his grantees. The thing—the *res*—is then his for him to deal with as he thinks fit, and the proceeding is at an end.

As the right to seize is universally recognised, so also is the title which the judgment of the Court creates. The judgment is of international force, and it is because of this circumstance that Courts of Prize have always been guided by general principles of law capable of universal acceptance rather than by considerations of special rules of municipal law. Thus it has come about that, in determining the national character of the thing seized, the Courts in this country have taken ownership as the criterion, meaning by ownership the property or *dominium* as opposed to any special rights created by contracts or dealings between individuals, without considering whether these special rights are or are not, according to the municipal law applicable to the case, proprietary rights or otherwise. The rule by which ownership is taken as the criterion is not a mere rule of practice or convenience; it is not a rule of thumb. It lays down a test capable of universal application, and therefore peculiarly appropriate to questions with which a Court of Prize has to deal. It is a rule not complicated by considerations of the effect of the numerous interests which, under different systems of jurisprudence, may be acquired by individuals either in or in relation to chattels. All the world knows what ownership is, and that it is not lost by the creation of a security upon the thing owned. If in each case the Court of Prize had to investigate the municipal law of a foreign country in order to ascertain the various rights and interests of every one who might claim a direct or indirect interest in the vessel or goods seized, and if, in addition, it had to investigate the particular facts of each case—as to which it would have few, if any, means of learning the truth—the Court would be subject to a burthen which it could not well discharge.

There is a further reason for the adoption of the rule. If special rights of property created by the enemy owner were recognised in a Court of Prize, it would be easy for such owner to protect his own interests upon shipment of the goods to or from the ports of his own country. He might, for example, in every case borrow, on the security of the goods, an amount approximating to their value from a neutral lender, and create in favour of such lender a charge or lien or mortgage on the goods in question. He would thus stand to lose nothing in the transaction, for the proceeds of the goods if captured would, if

recovered by the lender, have to be applied by him in discharge of his debt. Again, if a neutral pledgee were allowed to use the Prize Court as a means of obtaining payment of his debt instead of being left to recover it in the enemy's Courts, the door would be opened to the enemy for obtaining fresh banking credit for his trade to the great injury of the captor belligerent.

Acting upon the principle of this rule, Courts of Prize in this country have, from before the days of Lord Stowell, refused to recognise or give effect to any right in the nature of a "special" property or interest or any mortgage or contractual lien created by the enemy whose vessel or goods have been seized. Liens arising otherwise than by contract stand on a different footing, and involve different considerations; but even as to these it is doubtful whether the Court will give effect to them. Where the goods have been increased in value by the services which give rise to the possessory lien it appears to have been the practice of the Court to make an equitable allowance to the national or neutral lien holder in respect of such services. In the judgment in *THE FRANCES* (8 Cranch, 418), speaking of freight, it is said: "on the one hand the captor by stepping into the shoes of the enemy owner of the goods is personally benefited by the labour of a friend, and ought in justice to make him proper compensation, and, on the other, the shipowner by not having carried the goods to the place of their destination, and this in consequence of the act of the captor, would be totally without remedy to recover his freight against the owner of the goods."

It is, however, unnecessary to deal with the question of liens arising apart from contract, the present case being one of pledge founded on a contract made with the enemy.

When the authorities are examined it will be found that they bear out the view that enemy ownership is the true criterion of the liability to condemnation. The case of *THE TOBAGO* (5 C. Rob. 218; 1 Eng. P.C. 456) is in point. There the claimant was a British subject. In time of peace he had honestly advanced money to a French shipowner to enable the latter to repair his ship, which was disabled, and by way of security he had taken from the owner a bottomry bond. Afterwards war broke out with France, and the vessel was captured. In the proceedings in the Prize Court for condemnation the holder of the bottomry bond asked that his security might be protected,

but Lord Stowell (then Sir William Scott), after observing that the contract of bottomry was one which the Admiralty Court regarded with great attention and tenderness, went on to ask: "but can the Court recognise bonds of this kind as titles of property so as to give persons a right to stand in judgment and demand restitution of such interests in a Court of Prize?" and he states that it had never been the practice to do so. He points out that a bottomry bond works no change of property in the vessel, and says: "if there is no change of property there can be no change of national character. Those lending money on such security take this security subject to all the chances incident to it, and amongst the rest, the chances of war."

The decision in *THE MARY* (9 Cranch, 126) is to the same effect. Similarly in *THE AINA* (Spinks, 8; 2 Eng. P.C. 247) the Court refused to recognise or give effect to a mortgage on the ship captured, and the same point arose and was similarly decided in *THE HAMPTON* (5 Wall. 372). Again, in *THE BATTLE* (6 Wall. 498) the Court refused to recognise a maritime lien for necessities, a decision which was followed in *THE ROSSIA* (2 Russ. & Jap. P.C. 43). *THE ARIEL* (11 Moo. P.C. 119; 2 Eng. P.C. 600) was the converse case of an attempt to obtain condemnation, not of enemy goods, but an enemy lien on goods; it failed on the same principle. In that case Sir John Patteson said: "liens whether in favour of a neutral on an enemy's ship, or in favour of an enemy on a neutral ship, are equally to be disregarded in a Court of Prize."

All these cases were fully discussed by the President in *THE MARIE GLAESER* (*ante*, p. 38).

Passing to cases which in their circumstances more resemble the present case, there is *THE MARIANNA* (6 C. Rob. 24; 1 Eng. P.C. 518), in which the Court refused to give effect to a contract of pledge on goods consigned to the agent of the pledgee.

"Captors," says Sir W. Scott in that case, "are supposed to lay their hands on the gross tangible property on which there may be many just claims outstanding between other parties which can have no operation as to them. If such a rule did not exist, it would be quite impossible for captors to know upon what grounds they were proceeding to make seizure. . . . The doctrine of liens depends very much on the particular rules of

jurisprudence which prevail in different countries. To decide judicially on such claims would require of the Court a perfect knowledge of the law of covenant and the application of that law in all countries under all the diversities in which that law exists. From necessity, therefore, the Court would be obliged to shut the door against such discussions, and to decide on the simple title of property with scarcely any exceptions."

There is *THE FRANCES* (8 Cranch, 418), in which the Court refused to recognise or give effect to the rights of a consignee under the bill of lading for advances against the goods to which the bill of lading related. In that case the Court laid it down that "in cases of liens created by the mere private contract of individuals, depending upon the different laws of different countries, the difficulties which an examination of such claims would impose upon the captors and even upon the Prize Courts in deciding upon them, and the door which such a doctrine would open to collusion between the enemy owners of the property and neutral claimants have excluded such cases from the consideration of those Courts."

There is another American case, *THE CARLOS F. ROSES* (177 U.S. Rep. 655), in which the claim put forward by a neutral, who had advanced money upon a cargo on a captured ship, and who had received bills of lading covering the shipment, was rejected.

It is difficult to distinguish the facts in any of the three cases last mentioned from the facts of the present claim by Messrs. Schröder & Co. Some stress was laid by the appellants upon the dissenting judgments in *THE CARLOS F. ROSES* (177 U.S. Rep. 655), but a perusal of these judgments will shew that they proceeded upon the assumption that, in the circumstances, the general property in the goods had passed to the holder of the bills of lading. The case was decided before the judgment in *SEWELL v. BURDICK* (54 L. J. Q.B. 156; 10 App. Cas. 74). Finally, *THE HAMPTON* (5 Wall. 372) is a case in which the claim of a mortgagee on a ship was rejected.

Before adverting to the arguments by which the appellants seek to displace this weight of authority, it is necessary to deal with a contention put forward by them to the effect that, by their title as pledgees, they are clothed with a sufficient ownership to bring their case within the rule. This contention is based upon

the right of sale accorded to a pledgee by the law of England, by which, in the event of default by the pledgor in payment of his debt, the pledgee can sell the pledge without first having recourse to a Court of law for authority to do so. This right, it is said, creates a "special" property in the pledge in favour of the pledgee, and is a right *in re* constituting or equivalent to ownership, and distinguishable in character from the mere right *in rem* possessed by a lien holder. It is first to be observed of this right to sell without recourse to a Court of law that it is peculiar to the English law of pledge. It is thus precisely one of those matters which a Prize Court should leave out of consideration when applying to its decision general principles common to all systems of law to the exclusion of principles of municipal law.

The subject was very fully examined by Chancellor Kent in Lord Stowell's time, in 1805, in a learned judgment declaring the decision of the Supreme Court of the State of New York—*CORTELYOU v. LANSING* [1805] (2 Cairnes' Cases in Error, New York, 200, at p. 215). "I believe," he says, "that there is no country at present, unless it be England, that allows a pledge to be sold but in pursuance of a judicial sentence."

And secondly, it is to be observed that if the right clothes the pledgees with ownership it precludes the Court from making any decree at all of condemnation.

The ownership by which a Court of Prize is guided cannot subsist both in the pledgees and in the pledgors.

If it exists in the appellants in the present case, no decree can be made against them, for they are British subjects; and the interest left in the enemy subject cannot be condemned, for, *ex hypothesi*, it is not an interest which includes ownership. See *THE ARIEL* (11 Moo. P.C. 119; 2 Eng. P.C. 600), in which it was laid down that, as a Court of Prize ignores a lien in favour of a neutral on an enemy's ship, so will it ignore a lien in favour of an enemy on a neutral ship.

But when the nature of the right of a pledgee to sell is examined it will be seen that the so-called "special" property which it is said to create is in truth no property at all. This has been recognised by many Judges, who have used the expression "special interest" as a substitute for "special property"—see *MORES v. CONHAM* [1610] (Owen, 123) and *DONALD*



*v. SUCKLING* [1866] (35 L. J. Q.B. 232, at p. 247; L. R. 1 Q.B. 585, at p. 613).

If it were not for the somewhat unfortunate peculiarity of English terminology involved in the established use of the words "special property" when "special interest" would seem better, it is difficult to see how an argument could be maintained which would effectively distinguish pledge from lien for present purposes.

The very expression "special property" seems to exclude the notion of that general property which is the badge of ownership. If the pledgee sells, he does so by virtue and to the extent of the pledgor's ownership, and not with a new title of his own. He must appropriate the proceeds of the sale to the payment of the pledgor's debt, for the money resulting from the sale is the pledgor's money to be so applied. The pledgee must account to the pledgor for any surplus after paying the debt. He must take care that the sale is a provident sale, and if the goods are in bulk he must not sell more than is reasonably sufficient to pay off the debt, for he only holds possession for the purpose of securing to himself the advance which he has made. He cannot use the goods as his own. These considerations shew that the right of sale is exercisable by virtue of an implied authority from the pledgor, and for the benefit of both parties. It creates no *jus in re* in favour of the pledgee; it gives him no more than a *jus in rem* such as a lien holder possesses, but with this added incident, that he can sell the property *motu proprio* and without any assistance from the Court.

Returning to the authorities, the appellants attempt to displace them in the following way. They say, in the first place, that Lord Stowell, in *THE TOBAGO* (5 C. Rob. 218; 1 Eng. P.C. 456), was referring only to "secret" liens, which they interpret to mean liens not appearing on the ship's papers, and they contend that theirs was not secret for that it appears on the ship's papers—namely, on the face of the bills of lading. But when the judgment is examined it will be found that Lord Stowell used the term "secret liens" as equivalent to liens created by the act of the parties as opposed to those arising under the general law merchant. Further, it cannot in the present case be said with any truth that Messrs. Schröder's lien is disclosed on the ship's papers. It is true that the bill of lading was made out in favour

of them or their assigns; but this is quite consistent with their having no charge at all, and the consignment having been made to them merely as the factors or agents of the enemy owner. The contract of pledge under which alone their claim arises, however probable in the ordinary course of commerce, is nowhere disclosed in the ship's papers. Again, such as it was, the disclosure was certainly no more than existed in the cases of *THE MARIANNA* (6 C. Rob. 24; 1 Eng. P.C. 518), *THE FRANCES* (8 Cranch, 418), and *THE CARLOS F. ROSES* (177 U.S. Rep. 655).

Secondly, the appellants contend that, being by virtue of the bill of lading in possession of the goods in question, there can be no reason in principle why the Court should not recognise an interest arising out of such possession just as it recognises the carrier's possessory lien for freight. But such possession as the appellants had is not an actual possession such as forms the basis of a possessory lien at common law, but merely such possession as, according to the law relating to pledge, arises out of constructive or symbolical delivery. There is not, to use the words of Lord Stowell in *THE TOBAGO* (5 C. Rob. 218; 1 Eng. P.C. 456), that "interest directly and visibly residing in the substance of the thing itself" which is to be found in the actual possession held by a carrier. Further, it will be found that a possession, similar in character to that which Messrs. Schröder had, existed in several of the cases already referred to on the part of lien holders whose claims were rejected by the Court.

Thirdly, the Court was asked to accept the suggestion that the practice of making advances on the security of bills of lading had arisen after the decisions referred to had been pronounced, and that in the interest of commerce the adverse decisions should now be disregarded. With regard to this argument, it is to be observed that, at any rate, *THE CARLOS F. ROSES* (177 U.S. Rep. 655) was decided at a time when the practice referred to was well known; and although the decision cannot bind an English Court, still the considered judgment of the Supreme Court of the United States is entitled to the greatest possible weight. Further, it is difficult to see how any change—if there has been any change—in commercial practice invalidates the reasons which led to the decisions in question.

Lastly, the appellants urged that if the Court now applies the principles illustrated by the cases above referred to very serious injustice will be done to, and serious loss incurred by, neutrals or subjects who, before the commencement of the war and in the normal course of business, have made advances against bills of lading. It is to be observed that similar injustice and loss, though possibly on a less extensive scale, must have been occasioned by the application of the same rules in the eighteenth and early nineteenth centuries, and similar arguments were in fact addressed to Lord Stowell as a reason why they should not be applied in individual cases. The reason why such arguments cannot be sustained is fairly obvious. War must in its very nature work hardship to individuals, and in laying down rules to be applied internationally to circumstances arising out of a state of war it would be impossible to avoid it. All that can be done is to lay down rules which, if applied generally by civilised nations, will, without interfering with the belligerent right of capture, avoid as far as may be any loss to innocent parties. It is precisely because the recognition of liens, or other rights arising out of private contracts, would so seriously interfere with the belligerent right of capture, that the Courts have refused to recognise such liens or rights in spite of the hardships which might be occasioned to individuals from such want of recognition. It is said that in Lord Stowell's time there was a possibility of redressing any individual hardship which might be caused to neutral or subject by an appeal to the bounty of the Crown, and that in some way or other the Crown has lost its power of bounty in the matter. It is true that Lord Stowell, when pressed with the individual hardship of decisions he was about to pronounce, sometimes referred to the fact that any apparent injustice might be met by an exercise of the Crown's bounty—see *THE BELVIDERE* (1 Dods. 353) and *THE CONSTANTIA HARLESSEN* (Edw. 232).

Whether his judgments were in any way based on that consideration, or whether they would not have been the same if the possibility of the exercise of the Crown's bounty had not existed, is an arguable point.

In their Lordships' opinion, however, it is unnecessary to decide this point, for, after hearing the Attorney-General, they have come to the conclusion not only that the Crown had and

was accustomed to exercise a power of bounty by way of redress of hardships, but that such power still exists unimpaired.

Perhaps the most notable instance of the exercise of such power was the Order in Council made at the commencement of the war with Denmark in 1807. It was thereby ordered that in case any advances should have been made before the then late embargo—namely, September 2 then last passed—by any British subject upon the credit and security of any ship, freight, or goods belonging to Danish subjects which might be condemned as prize to His Majesty, the amount of such advances so actually made (but without further compensation) should be paid to the British subjects out of the proceeds of the property so condemned, upon the credit of which the advances were respectively made upon due proof thereof to the satisfaction of the High Court of Admiralty.

If the Crown could order this generally, it must also have had the power to order it in particular instances. Further, if it could make such an order in favour of British subjects it must also have had the power to make it in favour of neutrals, and circumstances can easily be imagined in which the exercise of such a power in favour of neutrals might, as a matter of policy, be deemed desirable.

If the Crown had and was accustomed to exercise the power of redressing hardship by way of bounty, such right must still exist unless taken away by Act of Parliament, and it must be remembered that the Crown's prerogative can only be abridged by express words or necessary implication. The argument to the effect that the power in question has ceased to exist is solely based on the effect to be given to the statutes which have been from time to time passed in reference to the Civil List. The first Civil List Act which affects droits of Admiralty and droits of the Crown is the Act of 1 Geo. 4. c. 1. By section 2 of this Act the produce of certain Crown revenues (which did not include droits of Admiralty, or droits of the Crown, or other small casual revenues) were for the life of King George IV. carried to the Consolidated Fund. It was provided that an account of all moneys to be received in respect of the casual revenues of the Crown, including droits of Admiralty and droits of the Crown, and of the application thereof, should annually be laid before Parliament. By section 2 of 1 Will. 4. c. 25, the casual

revenues of the Crown, including droits of Admiralty and droits of the Crown, were treated in the same way as the other hereditary revenues and carried during the life of King William IV. to the Consolidated Fund, it being provided that all such revenues should after his death be payable to his heirs and successors. Section 12 of this Act provides that nothing therein contained should impair or prejudice any rights or powers of control, management, or direction, relative to (*inter alia*) the granting of any droits of Admiralty or any droits of the Crown as a reward or remuneration to any officer or officers or other person or persons seizing or taking the same or giving any information relating thereto, it being the true intent and meaning of the Act that the said rights and powers should not in any degree be prejudiced in any manner, but only that the moneys accruing to the Crown after the full and free exercise and enjoyment of the said rights and powers should, during His Majesty's life, be carried to the Consolidated Fund. It was obviously the intention of this clause that the Crown's right of making grants out of droits of Admiralty and droits of the Crown in favour of captors or persons giving information leading to the capture should be preserved; but nothing being expressly said as to making grants in order to redress hardships, it is arguable that on the principle of *expressio unius est exclusio alterius* the Crown's right in this respect was intended to be taken away. Further, the same argument is open upon the construction of 1 & 2 Vict. c. 2, which in effect re-enacts the Act of 1 Will. 4. c. 25 during the reign of Queen Victoria. It is unnecessary actually to decide the point, and their Lordships will assume, for the purpose of this case, that, during the reigns of King William IV. and Queen Victoria, the right of the Crown in respect of Admiralty droits and droits of the Crown was confined to rewarding captors and persons giving information leading to the capture. It seems clear, however, that on the death of Queen Victoria, her successor, King Edward VII., became entitled to droits of Admiralty and droits of the Crown to the same extent as if there had never been a surrender in favour of the Consolidated Fund. In other words, any restriction created during the lives of King William IV. and Queen Victoria ceased to apply. If, therefore, the ancient right of the Crown to dispose of these droits is now curtailed, it must be by virtue of some

statute passed subsequently to the death of Queen Victoria. In other words, it must be by virtue of the Civil List Acts (1 Edw. 7. c. 4. & 1 Geo. 5. c. 28).

By 1 Edw. 7. c. 4, s. 1, it is provided that the hereditary revenues, which were, by section 2 of 1 & 2 Vict. c. 2, directed to be carried to and made part of the Consolidated Fund, should, during the life of King Edward VII. and six months afterwards, be paid into the Exchequer and made part of the Consolidated Fund. By section 9, sub-section 2, it is provided that nothing in the Act contained should affect any rights or powers for the time being exercisable with respect to any of the hereditary revenues which were by the Act directed to be paid into the Exchequer, and by sub-section 3 of the same section the 1 & 2 Vict. c. 2 was, with immaterial exceptions, repealed. The Act of 1 Geo. 5. c. 28 re-enacts in the same terms the Act of 1 Edw. 7. c. 4 for the life of his present Majesty and six months afterwards.

The question, therefore, is as to the meaning and effect of the reservation contained in the two last-mentioned Acts of the rights and powers of the Crown for the time being exercisable. It should be noticed in contrast to the Acts of 1 Will. 4. c. 25 and 1 & 2 Vict. c. 2 that the reservation is not specific, but general in its terms. It should be noticed also that it is not a reservation of rights and powers which were or might have been exercised by some former sovereign or sovereigns (the form of reservation in some of the earlier Civil Lists Acts), but a reservation of rights and powers "for the time being exercisable." This must mean powers which have not at the date of their proposed exercise been taken away by Act of Parliament. To ascertain the nature of the rights and powers intended to be reserved, it is permissible to consider the object for which the Acts themselves and the earlier Acts hereinbefore mentioned were passed.

The object of each of these Acts is a surrender by the Crown of its hereditary revenues in consideration of a fixed grant from Parliament. Each Act has been intended to carry to the Consolidated Fund revenue which would otherwise have gone to the sovereign, and not revenue which, because of the exercise of some right or power in the Crown, would never have gone to the sovereign at all. This object was, in the Acts of George IV.,

William IV., and Victoria, sought to be attained by a specific enumeration of the rights reserved. In the Acts of Edward VII. and George V. it is sought to be attained by a general reservation of all rights. It could hardly be contended that the rights and powers expressly reserved in the earlier Acts are not included in the general reservation contained in the later Acts. If such a contention were well founded, the Crown would have lost many rights, the existence of which is of great importance in the public interest. It would have lost, for instance, the right to make grants to the natural children of a bastard intestate or to reward captors or persons giving information leading to the capture of enemy goods. It is of equal importance in the public interest, and indeed of friendly relations with neutral Powers, that the Crown should retain the power of making, in the interests either of British subjects or of neutrals, such an Order in Council as was done at the outbreak of the Danish war in 1807. The only distinction is that no such power was expressly reserved in the earlier Civil List Acts. It is, in their Lordships' opinion, much more reasonable to suppose that the general words were used to cover such a case than to confine the words themselves, in spite of their generality, to rights and powers expressly reserved by the earlier Acts. If the words of reservation now in force are sufficient to cover a right of so important and useful a nature, it would, in their Lordships' opinion, be wrong to hold that it had been destroyed merely because it had ceased to be exercisable during the reigns of King William IV. and Queen Victoria. Their Lordships therefore hold that the power in question still exists. They desire, however, to state that they express no opinion as to whether the present case is one in which the power ought to be exercised.

There were two other points suggested in argument which deserve some consideration. First, it was said that the difficulty of recognising liens on captured enemy goods might be less in the case of a lien holder being a subject than in the case of his being a neutral. In the case of a neutral it is obvious that the payment of the lien out of the proceeds of a sale of the goods would enure directly to the benefit of the enemy. The enemy debt would thus be paid at the expense of the captors instead of the neutral being left to recover it in the enemy Courts. A right of capture at sea would thus be deprived of its national

advantage. On the other hand, if the lien holder be a subject, his right of proceeding in the enemy Courts is, if not lost, at any rate suspended by the existence of a state of war. If the right be lost, the recognition of the lien would not, it is said, enure to the advantage of the alien enemy, but merely to one of His Majesty's subjects. If the right be merely suspended, it could not enure to the advantage of the alien enemy, at any rate until after the war, and the Court, it is said, should only consider the existing state of war and not be guided by what will happen when the war is over. There may be some force in these considerations, but, on the other hand, it is to be remembered that by international comity the Courts of Prize in this country have in general extended to neutrals the same advantages as they afford to His Majesty's subjects, and it would be difficult to make an exception. Moreover, both in the case of a neutral and of a subject the lien holder may have in his hands assets belonging to the enemy to which he can have recourse for the payment of his debt; and into such a matter the Courts have no means of enquiring.

The second suggestion does not involve the same difficulty. It is that the rules laid down in the cases referred to should be confined to transactions originating during the war, and that liens created *bona fide* before the war began might well be recognised whether held by subjects or neutrals. There is, however, no authority for such a distinction; indeed, authority is the other way—see *THE TOBAGO* (5 C. Rob. 218; 1 Eng. P.C. 456).

Neither of the above suggestions was seriously pressed on their Lordships, nor could either of them be accepted.

For the foregoing reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed.

#### THE WOOLSTON.

The above judgment in the case of the cargo *ex Odessa* applies equally in the case of the cargo *ex Woolston*. The only difference between the two cases is that the *Odessa* was an enemy ship and the *Woolston* was a British ship. Their Lordships are of opinion that enemy goods on board British ships at the commencement of hostilities are the proper subject



of maritime prize. The point has been more fully dealt with in the judgment in the case of *THE ROUMANIAN* (*ante*, p. 536). The fact that the *Woolston* was a British ship can therefore have no importance unless it be necessary for the Court to act upon some presumption arising from the character of the ship. It is unnecessary to act on any such presumption, where, as in the present case, the whole facts are in evidence, and the enemy character of the cargo is fully established.

In this case also their Lordships will humbly advise His Majesty that the appeal should be dismissed.

*Appeals dismissed.*

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*Solicitors*—Stibbard, Gibson & Co., for appellants; Treasury Solicitor, for respondent.

[*Reported by C. E. Malden, Esq., Barrister-at-Law.*]

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[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). Oct. 28, 1915.

THE GERMANIA.

*Enemy Yacht—Outbreak of War—Detention in British Port—Days of Grace—Condemnation—Sixth Hague Convention—Violation of its Provisions by the Enemy—Effect—Liability for Repairs—Dry Docking.*

*The provisions of the Sixth Hague Convention, with regard to days of grace, are intended to protect vessels engaged in commerce, and do not afford protection to enemy yachts. Therefore a German yacht detained in a British port on the outbreak of war, according to the ordinary law by which enemy property seized in port is confiscable, is subject to condemnation.*

*Claims in respect of repairs executed to the yacht before the detention, and in respect of dry docking afterwards, acceded to by the Crown as an act of grace.*

*Quære, whether a belligerent Power which has violated many of the provisions of the Hague Convention can claim the protection of any of its provisions from other contracting parties.*

Cause for condemnation of a yacht as enemy property.

On July 30, 1914, the racing yacht *Germania*, owned by Herr Gustav Krupp von Bohlen, a German subject, arrived at Cowes to take part in the Cowes Regatta.

On August 4 war broke out between Great Britain and Germany, and on August 6 the yacht was seized by the Customs authorities, a writ in prize was issued, and on September 24 an order for detention, as in *THE CHILE* (*ante*, p. 1), was made.

To prevent the deterioration of the *Germania* leave was given by the authorities to the owner's agents to dry dock and paint her; but there was an express stipulation that the contractors were to have no lien against the Admiralty Marshal for the work done.

The Crown now asked for an order for condemnation. Appearances were entered on behalf of (1) Baron F. von Bülow (a German subject now interned in this country), as agent for Herr Krupp von Bohlen; (2) Summers & Payne, Lim., in respect of work done and money advanced; and (3) Ratsey & Lapthorn, Lim., and Pascall, Atkey & Son, Lim., in respect of work done and materials supplied to the yacht before the outbreak of war.

The claim of Summers & Payne, Lim., amounted to 1,028*l.*, 176*l.* 2*s.* 6*d.* of which was in respect of docking and overhauling the yacht before the outbreak of war, and 252*l.* for dry docking and attending to her afterwards. They had advanced 400*l.* against a cheque of the master on the Dresdner Bank to pay the wages of the crew, and a portion of this sum was spent on repatriating the crew. Owing to the outbreak of war the cheque was not met.

The claims of Ratsey & Lapthorn, Lim., and Pascall, Atkey & Son, Lim., were in respect of sails, gear, and other necessities supplied to the *Germania* before the outbreak of war.

*The Solicitor-General* (Sir F. E. Smith, K.C.) and A. B. Marten (for G. T. Simonds, serving with H.M. Forces), for the Crown.

*Bateson, K.C.*, and *C. R. Dunlop*, for Baron F. von Bülow and Summers & Payne, Lim.

*W. N. Raeburn*, for Ratsey & Lapthorn, Lim., and Pascall, Atkey & Son, Lim.

*The Solicitor-General (Sir F. E. Smith, K.C.)*.—Without making any admission that the claimants, Ratsey & Lapthorn, Lim., and Pascall, Atkey & Son, Lim., are entitled to anything according to strict legal principles, inasmuch as the sails, &c., in respect of which they claim were supplied before the outbreak of war, the Crown will consent to a reference to ascertain the amounts due to these two claimants.

The yacht should be condemned as a *droit* of Admiralty. The Sixth Hague Convention in terms only purports to protect merchant vessels engaged in commerce, and does not apply to yachts. Article 1 provides that: "When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated to it. The same principle applies in the case of a ship which has left its last port of departure before the commencement of the war, and has entered a port belonging to the enemy while still ignorant that hostilities had broken out." And article 5 provides that: "The present Convention does not refer to merchant ships which shew by their build that they are intended for conversion into warships."

It is suggested by the claimants that the *Germania* is of no naval or commercial value, but it is obvious that she could be used for auxiliary naval purposes, such as observation. In *THE ORIENTAL*,<sup>1</sup> where days of grace were given to a Hungarian

(1) *THE ORIENTAL*.—In this case, tried before the PRESIDENT on March 8, 1915, the Crown claimed the condemnation of the steam yacht *Oriental*, 327 tons, seized at Cowes after the outbreak of war between Great Britain and Austria, on the ground that she belonged to a Hungarian subject.

SIR SAMUEL EVANS (THE PRESIDENT), in the course of his judgment, said: The *Oriental* was allowed a certain number of days of grace to leave because she was a Hungarian vessel. The Crown contends that, although days of grace were accorded, in truth and in fact she is not a vessel to which the Hague Convention applies at all. The

yacht seized at Cowes, the Court pointed out that the vessel was not one to which the Sixth Hague Convention applied. Days of grace were given in that case because the Austro-Hungarian Government had granted days of grace to British vessels.

*Bateson, K.C.*—Although not a merchant vessel, the *Germania* is within the spirit of the Hague Convention. Yachts are not specifically mentioned, because no one could have imagined that private property of such a kind found in a belligerent port on the outbreak of war would be condemned. By the comity of nations days of grace have been granted to enemy merchant vessels since 1854, and *a fortiori* a racing yacht, which had come practically as a guest to Cowes Regatta, should have been given an opportunity to leave.

THE ORIENTAL<sup>1</sup> was not decided on the ground that yachts were not mentioned in the Sixth Hague Convention, but on the ground that the vessel, having been granted days of grace, did not avail herself of them. If the *Germania* is condemned, Summers & Payne, Lim., will run the risk of losing the money they have spent upon her. She is housed in their yard, and at least they must have a possessory lien for the expenses of docking and overhauling before the outbreak of war.

*The Solicitor-General (Sir F. E. Smith, K.C.)*, in reply.—Although the yacht is in the claimants' yard, she is under the control of the Admiralty Marshal. The sole question is whether she comes within the Sixth Hague Convention, and she clearly does not.

[SIR SAMUEL EVANS (THE PRESIDENT).—Assuming for a moment that this vessel is within the Hague Convention, I

Hague Convention applies only to merchant vessels. The preliminary article to Convention VI. shews that the object was to secure the safety of commerce as far as possible, and the French version—which is the authoritative one—describes vessels which come within the purview of that convention as *navires de commerce*. This is not a vessel coming within that category at all. Nevertheless, this country was willing to give some days of grace as a matter of fairness due to the comity of nations, and certain days of grace were allowed to this vessel. For some reason she was not able to avail herself of them, and she remained there until the days of grace would have expired if she had come under the Hague Convention. It is quite clear on these grounds that this vessel was enemy property at the time of seizure and was confiscable, and therefore I order that she be condemned and sold, and that the proceeds of her sale be paid into Court.

am not sure that a serious question may not arise some day whether Germany can complain of anything that is done in violation of the Hague Convention. An agreement, whether made between individuals or States, must be observed by both sides, and some one may have to determine whether Germany has so far adhered to the Hague Convention that she can call upon any other party to observe it.]

If I am a Law Officer at the time I shall certainly most strenuously contend that a Power, which it would be easy to shew has violated many of its most important provisions, cannot be heard in this or any other Court to contend that we are bound by the remaining provisions.

With regard to the claim of Summers & Payne, Lim., to some extent the Crown has benefited by what has been done to the yacht; and if the claimants ask to have their claim dealt with as a matter of indulgence, without going into the question of liability, the Crown is willing to make some allowance.

[A consultation then took place between the parties, and it was agreed that the two items of 252*l.* and 176*l.* 2*s.* 6*d.* should be referred to the Registrar.]

SIR SAMUEL EVANS (THE PRESIDENT).—In this case the Crown asks for the condemnation of the German yacht *Germania*, which belonged at the outbreak of war to Herr Gustav Krupp von Bohlen, a German subject.

The yacht was at Cowes at the end of July, and on the outbreak of war on August 4 was seized by the Customs authorities on behalf of the Crown as a *droit* of Admiralty. A writ was issued in prize, and on September 24, 1914, an order was made in this Court for the detention of the yacht. That was not a final order, and the present application is that the order should be superseded by another of a more extensive kind—namely, that the yacht should be condemned as enemy property.

The *Germania* is a racing yacht, and clearly does not come within the terms of the Sixth Hague Convention, which, according to the preamble, is a convention dealing only with matters relating to commerce, and intended only to protect vessels engaged in commerce. The words used in describing vessels in the authoritative French language are *navires de*

commerce, and counsel for the claimants has not suggested—and no one could suggest—that this yacht comes within those terms. Therefore it is perfectly clear that no defence can be made to the condemnation of the vessel on the ground of the Hague Convention.

It is argued on behalf of the claimants that, according to the spirit of the Hague Convention, this yacht nevertheless ought not to be regarded as confiscable, and ought not to be condemned. I must deal with this matter according to the ordinary law, and according to the ordinary law this property of a German subject, being in port at the outbreak of war, is, I think, clearly confiscable, and I condemn it as a prize of Admiralty in favour of the Crown.

There was a claim here by Messrs. Summers & Payne, Lim., who had done certain work upon the yacht before seizure—that is to say, towards the end of July. Their claim amounted to 176*l.* 2*s.* 6*d.*; and they have done other work to the yacht, and have also housed some of the fittings since the date of the seizure. By the express terms of the arrangement between them and the Marshal, any sums which they might expend upon the repairs of the yacht, and to keep it from deterioration, they were to expend at their own risk in the hope of getting payment for their expenses from the owner of the yacht. In other words, it is perfectly clear that they were not to expend any sums of money so as to found any claim either against the Marshal of the Court or against the captors. So far as the housing of the yacht is concerned—the protection of the various parts of the yacht—the suggestion that the claimants should take care of them came from Messrs. Summers & Payne, Lim., in the following letter of October 9, 1914, to the Customs authorities at Southampton:

“Dear Sir, German yacht *Germania*.—Will you permit us to suggest that the topmasts, rigging and blocks of this yacht, the main gaff, spinnaker boom, and boats be brought on shore and housed with other gear which we have belonging to this yacht? The *Germania* is a very high-class racing yacht, and if neglected will very quickly deteriorate. We already have an account against the yacht. The owner is an old and esteemed customer, and we would be prepared to do this work as we feel sure we should receive the cost from him when at the end

of the war matters of ownership are settled. We are, Sir, your obedient servants."

Subsequently this suggestion was acceded to by the Marshal, but upon a distinct understanding that there was to be no liability on his part. Certain other sums of money were also expended.

I should have been prepared to decide on legal grounds against the claim Messrs. Summers & Payne, Lim., have put forward here; but I am not sorry at all that the Crown have met the claimants, and that an arrangement has been made between them that a reference to the Registrar should be had by consent, without raising any question of obligation at all, to see what sum ought to be allowed in respect of the amount of 176*l.* 2*s.* 6*d.* and the other amount of 252*l.*, which have been sent in by Messrs. Summers & Payne, Lim. That will dispose of their claim against the captors, and against anybody connected with this Court, but, of course, it does not prevent them from pursuing any remedies they may have against the owner of the vessel, and I hope that at some time they will obtain repayment of whatever money has been expended by them; but, so far as this Court is concerned, it cannot assist them further than they will be assisted by the consent order.

I order the condemnation of the yacht as enemy property, and order it to be sold by the Marshal.

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*Solicitors*—Treasury Solicitor; Kenneth Brown, Baker, Baker & Co.; Lowless & Co.

[*Reported by E. C. Trehern, Esq., Barrister-at-Law.*]

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[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT).

Oct. 25. Nov. 1, 1915.

THE PARCHIM.

*Cargo—Ante-bellum Contract of Sale—Post-bellum Shipment—C.i.f. Contract—Passing of Property—Allied Ship—Trading with the Enemy—Freight.*

*Under a contract of July 13, 1914, made between the sellers, a firm of German merchants at Hamburg, with a branch at Valparaiso, and the buyers, a Dutch firm at Veendam, Holland, a cargo of nitrate of soda was loaded at Taltal, Chili, in a Russian sailing ship, which had been chartered by the German firm to carry the cargo to Delfzyl, Holland. Loading began in July, but was not completed until after the outbreak of war. The bills of lading, dated August 6, were made out to the order of the sellers. The ship sailed on August 29. On December 6 she arrived at Plymouth, where the cargo was seized as enemy property.*

*The contract of sale provided that payment, to include cost and freight, was due ninety days after receipt of the first bill of lading, and was to be paid three days after maturity, or, in case of an earlier arrival of the ship, against acceptance of the documents. The buyers were to provide a banker's guarantee for 5,000l. for the due performance of the contract, the value of the cargo being 22,115l. Insurance, including war risk, was to be covered by the sellers, the buyers to accept the policy against payment of the premium. The buyers provided the banker's guarantee, and deposited the purchase price in the sellers' bank with instructions not to part with it until all the bills of lading had arrived. The bills of lading, which were made out in sets of three copies each, were forwarded to the sellers' house in Hamburg. The first copies arrived on September 9, and the third had arrived by January 25, 1915; but they remained at the sellers' bank in Hamburg, and were not taken up until after the cargo had been seized.*

*It was contended by the Dutch buyers that the property had passed to them.*

*Held, that the prima facie presumption—arising from the fact of the bills of lading being to the order of the sellers—that the sellers had reserved the right of disposal, was not rebutted by the requirement of the banker's guarantee; that the parties did not intend the property in the goods to pass to the buyers until the documents were accepted and the price paid; that if the property did not pass on shipment it could not pass while the goods were in transitu so as to defeat the rights of belligerents; and that at the time of seizure the property was in the enemy sellers, and the goods must be condemned.*



Held, further, that on the outbreak of war between Russia and Germany it became illegal for the Russian shipowners to continue to perform their contract with the German charterers; that after August 4, when Germany became the common enemy of Russia and of Great Britain, a British Prize Court had power to deal with a Russian vessel engaged in illegal trading; and that strictly the vessel was liable to confiscation, and, although the Crown did not ask for this penalty, that a claim of the Russian shipowners for freight and expenses must be disallowed.

Cause for the condemnation of cargo.

The subject-matter of this claim was 60,739 quintals of nitrate of soda laden on board the Russian sailing ship *Parchim*, which were seized at Plymouth on December 6, 1914, as being the property of H. Folsch & Co. (hereinafter called the sellers), enemy merchants, of Hamburg, with a branch house at Valparaiso.

A claim was made to the cargo by the *Nl. Vennootschap Veendammer Kunstmesthandel*, of Holland (hereinafter called the buyers), upon the ground that the property had passed to them.

A claim was also made by the Russian shipowners in respect of freight and other expenses.

Under the contract of sale, which was entered into on July 13, 1914, the nitrate was loaded at Taltal, Chili, in the *Parchim*, which had been chartered by the sellers from the Russian owners. Loading began in July, but was not completed until after the outbreak of war. The *Parchim* sailed on August 29.

The bills of lading, dated August 6, were for a voyage to Delfzyl in Holland. They were made out to the order of the sellers in sets of three copies each. The contract of sale provided that payment, to include cost and freight, was due ninety days after receipt of the first bill of lading, and was to be paid three days after maturity, or, in case of an earlier arrival of the ship, against acceptance of the documents. It was further provided that the buyers were to give a banker's guarantee for 5,000*l.* for the due performance of the contract. The value of the cargo was 22,115*l.* Insurance, including war risk, was to be covered by the sellers, the buyers to accept the policy of insurance against payment of the premium.

The bills of lading were duly forwarded to the sellers' house in Hamburg, the first copies arriving on September 29; and on October 19 the sellers sent an invoice to the buyers from Hamburg, noting December 9 as the date for payment. The buyers provided the banker's guarantee, and deposited the purchase price with the sellers' bankers, but instructed them not to part with the money until all the bills of lading had arrived. The last bill of lading did not arrive until the third week of January, 1915, and meanwhile the cargo had been seized as prize. It was not proved whether the bills of lading and policy of insurance were at any time regularly taken up, but for the purposes of the judgment it was assumed in the buyers' favour that this was done on or about January 25.

*The Solicitor-General (Sir F. E. Smith, K.C.) and Theobald Mathew*, for the Crown.—The bills of lading were to the order of the sellers, and were sent to the German bank to hold on behalf of the sellers until payment was made. The sellers therefore intended to reserve the *jus disponendi*, and no payment was made until after seizure. The property, therefore, at the date of seizure was still in the enemy consignors—see Sale of Goods Act, 1893, s. 19, sub-s. 2.

The shipowners' claim for freight must fail, because the circumstances shew that after the outbreak of war the ship of an ally in fact was trading with the enemy.

*Mackinnon, K.C., and C. R. Dunlop*, for the buyers.—The date of the contract between the sellers and the Dutch buyers being July 13, 1914, although the actual shipment was made after the outbreak of war, the whole transaction should be regarded as an *ante-bellum* transaction. The claimants were bound under their contract, which was not made in contemplation of war—see *THE SOUTHFIELD* (*ante*, p. 332), *THE VROW MARGARETHA* [1799] (1 C. Rob. 336; 1 Eng. P.C. 149), and *cp. THE JAN FREDERICK* [1804] (5 C. Rob. 128; 1 Eng. P.C. 434). It was a genuine transaction; the cargo was appropriated to the contract from the beginning, and was consigned in a named ship. Further, the requirement by the sellers of a guarantee for the due performance of the contract shews that they were not reserving the right of disposal, and the mere fact that the bills of lading were in the names of the sellers

does not prevent the property passing—*JOYCE v. SWANN* [1864] (17 C. B. (N.S.) 84); and see Sale of Goods Act, 1893, s. 18, rule 5 (1).

The principle laid down in *THE MIRAMICHI* (*ante*, p. 137) does not apply. In that case the buyers refused to take up the documents; in the present case the goods were paid for shortly after seizure. In the case of an *ante-bellum* transaction the Court should not have regard solely to the question whether the property had passed at the time of seizure, but should look at the whole contract to see whether the property had not passed by the subsequent performance of the contract in the ordinary course of business.

The bill of lading contract is between the Russian shipowners and the neutral buyers. There is no question of trading with the enemy between them, and if the goods are released the buyers recognise their obligation to pay freight to the Russian shipowners.

*Dawson Miller, K.C.*, and *L. F. C. Darby*, for the shipowners.—If the Court condemns the cargo, the shipowners are entitled to their freight out of the proceeds. The conduct of the master of the vessel was meritorious, and in no way blameworthy. The cargo was destined to a neutral port, and if the master had declined to proceed on the voyage the cargo would have remained with the enemy shippers. He decided to sail, and brought the cargo into a British port. Even if in law the property in the goods had not passed to the Dutch buyers, the goods had been sold to them, and the master was merely carrying out the bill of lading contract between his owners and the neutral subjects in Holland.

The shipowner is not bound to part with the cargo except on payment of freight. He has a *jus in re*, and the captor takes the cargo *cum onere*—see *THE TOBAGO* [1804] (5 C. Rob. 218, *per* Sir W. Scott at p. 222; 1 Eng. P.C., at p. 457).

SIR SAMUEL EVANS (THE PRESIDENT).—The Crown asks for condemnation of the cargo of nitrate of soda laden on board the Russian sailing vessel *Parchim* upon the ground that at the time of seizure it was the property of Folsch & Co., enemy merchants, of Hamburg, who also had a branch at Valparaiso. The claim to the cargo is made on behalf of a Dutch company

upon the ground that the property had passed to them as purchasers.

The contract relating to the goods was made at Hamburg on July 13, 1914, between the German company as sellers and the Dutch company as buyers. The contract is in writing, and can be referred to for its terms. The cargo was shipped on the *Parchim*, which was chartered by the German company at Hamburg on May 6, 1914, subject to provisions for the substitution of another vessel by the buyers, if, on account of the ship's delay, the charterparty was cancelled. The price included cost and freight.

The insurance, including war risk, was to be covered by the sellers, and to be charged at a fixed rate, the buyers having to accept the policy of insurance against payment of the premium and costs. The price, according to invoice, was due ninety days after receipt of the first bill of lading, and was to be paid three days before maturity, or, in case of an earlier arrival of the vessel, then against acceptance of the documents. The buyers were to provide bankers' guarantee for 5,000*l*.

The *Parchim* was loaded in due course at Taltal, in Chili. The bills of lading were dated August 6, 1914. The vessel sailed on August 29.

The invoice was sent to the buyers by Folsch & Co. from Hamburg on October 19, 1914. It noted December 9 as the due date. It was said that the ship put into Plymouth for orders in accordance with the charterparty. The cargo was seized at Plymouth on December 6.

The question is in whom the property in the cargo was at this time.

It was contended by the claimants that the property passed to them either at the time the contract was entered into, or at the time of shipment, or at the date of the invoice. Payment after seizure was also relied on.

The bills of lading were for a voyage to Delfzyl (a Dutch port) direct. They were made out to the order of the shippers, the German company. The German company therefore are *prima facie* deemed to have reserved the right of disposal.

Is this *prima facie* presumption rebutted by any other circumstances in the case?

The bills of lading were made out in six sets of three copies

each. They were sent to Folsch & Co., in Germany, or their bankers. One set seems to have arrived on September 9. When the second set was received was not proved. The third set arrived a few days before January 25, 1915.

In a letter of January 25, 1915, the claimants' lawyers wrote from Amsterdam to their agents in London: "Till a few days ago only two copies of each set of bills of lading had arrived; we are now also in possession of the failing third copies, so that our clients are able to prove their ownership of the cargo."

It was at one time said that, payment of the full price according to the invoice was made by the buyers on December 9. But that was not so. I doubt whether the so-called certificate of receipt of December 9, 1914, is a contemporaneous document. What happened was that the Dutch company deposited the money about that date in Folsch & Co.'s bank with instructions not to part with it until all the three complete sets of bills of lading had arrived.

The witness, Mr. Grönhuis, said that the Dutch company had never had the bills of lading in their possession at any time; that they had remained from the first at Folsch & Co.'s bank.

Whether the bills of lading and insurance policy were ever regularly taken up was not clearly proved, but I am willing to assume that they were. But this was not done until about January 25, 1915.

The deposit of the money was probably made because the Dutch company's bankers had given the guarantee of 5,000*l.* referred to in the charterparty.

The requirement by the sellers of this guarantee was relied upon by the claimants' counsel as the strongest circumstance to shew that the sellers had not reserved any right of disposal over the goods. It was a guarantee to the extent of 5,000*l.* for the performance of the contract by the buyers. It could not, in my opinion, change the character of the contract or alter its effect.

At first Folsch & Co. required a banker's guarantee for the full value of the cargo, which was over 22,000*l.* They afterwards agreed to accept a guarantee of 5,000*l.* (less than a quarter of the value), and the guarantee they required was "that the documents per *Parchim* will be taken up on the proper due

date or on arrival of the vessel by the buyers, and that the bank is answerable to us for any deficit which we may suffer up to an amount of 5,000*l*."

The guarantee was given on July 16, 1914, and was as follows:

"Groningen, July 16, 1914.

"The Groningsche Crediet and Handelsbank, at Groningen, hereby declares that it guarantees to the firm, H. Folsch & Co., of Hamburg, that the bills of lading for the cargo of Chili nitrate per *Parchim*, of 2650-2750 tons, on the due date or upon the arrival of the vessel in the port of destination, shall be properly taken up by the purchaser, the Nl. Vennootschap Veendammer Kunstmesthandel, of Veendam, and that it (that is to say, the said bank) will pay to the firm, H. Folsch & Co., all damages arising from delay in the payment for the said consignment, but at the utmost up to an amount of 5,000*l*. sterling.—The Groningsche Crediet and Handelsbank."

In my view this circumstance does not affect the question of ownership, and does not rebut the *prima facie* presumption that the sellers reserved the *jus disponendi*.

I am of opinion that they did reserve this right, and that the property in the goods did not pass from them on the shipment. It was contended that, at any rate, there was a complete appropriation of the goods when the invoice was sent. But the appropriation was not an unconditional one. Moreover, if the property did not pass on shipment, it could not pass afterwards while the goods were *in transitu* so as to defeat the rights of belligerents. Property cannot so pass after the outbreak of war.

The proper conclusion in the case, in my opinion, is that the parties did not intend that the property should be transferred to the buyers until acceptance of the documents and payment of the price by the buyers; and that at the time of seizure on December 6 the property remained in the German sellers.

The goods were therefore at that time confiscable to the Crown in its right to droits of Admiralty, and I pronounce condemnation of the goods accordingly.

In this view of the case it is unnecessary to consider the effect of the shipment of the goods after the commence-

ment of the war upon a vessel of an ally under charter to an enemy.

There remains to be determined the claim of the shipowners to freight and other expenses.

The ship was chartered by Messrs. Folsch & Co. from its Russian owners. It is a fundamental principle of prize law that all trade with the enemy is prohibited, under the penalty of confiscation, not only to subjects of the belligerent country, but also to subjects of allies in the war trading with the common enemy. The general principle is nowhere better stated than by Lord Stowell in *THE NEPTUNUS* [1807] (6 C. Rob. 403, at p. 406; 1 Eng. P.C. 593, at p. 596):

“It is well known that a declaration of hostility naturally carries with it an interdiction of all commercial intercourse; it leaves the belligerent countries in a state that is inconsistent with the relations of commerce. This is the natural result of a state of war, and it is by no means necessary that there should be a special interdiction of commerce to produce this effect. At the same time it has happened, since the world has grown more commercial, that a practice has crept in of admitting particular relaxations; and if one State only is at war, no injury is committed to any other State. It is of no importance to other nations how much a single belligerent chooses to weaken and dilute his own rights. But it is otherwise when allied nations are pursuing a common cause against a common enemy. Between them it must be taken as an implied, if not an express contract, that one State shall not do anything to defeat the general object. If one State admits its subjects to carry on an uninterrupted trade with the enemy, the consequence may be that it will supply that aid and comfort to the enemy, especially if it is an enemy depending, like Holland, very materially on the resources of foreign commerce, which may be very injurious to the prosecution of the common cause and the interests of its ally. It should seem that it is not enough, therefore, to say that the one State has allowed this practice to its own subjects; it should appear to be at least desirable that it could be shewn that either the practice is of such a nature as can in no manner interfere with the common operations, or that it has the allowance of the confederate State.”

And the penalty for such trading by the subject of an ally is the forfeiture in the Prize Courts of the ally of his property engaged in such trade—see *Wheaton's International Law* (8th ed. by Dana), par. 316. I have dealt more fully with the rights and duties of allies in my judgment in *THE PANARIELLOS* (*ante*, p. 195).

On the outbreak of war between Russia and Germany on August 1 it became illegal for the shipowners to go on performing their contract with the enemy charterers. They nevertheless did so, and it was part of their case that they put into Plymouth for orders in accordance with the charter-party. After August 4, when Germany became the common enemy of Russia and of Great Britain, our Courts also had the power to deal with property engaged in illegal trading.

It was not suggested that the outbreak of war was not known at Valparaiso and Taltal immediately after August 1 and 4, nor was it suggested that it was not known by the sellers and shipowners and shipmaster before the vessel sailed on August 29. I have in other cases called attention to Lord Stowell's observations about the rigid enforcement of the rule (*inter alia*) "where the parties have not used all possible diligence to countermand the voyage after the first notice of hostilities"—*THE HOOP* [1799] (1 C. Rob. 196, at p. 216; 1 Eng. P.C. 104, at p. 116).

Strictly, therefore, the ship itself, being the property employed in the illegal trade, is liable to confiscation—see *THE ODIN* [1799] (1 C. Rob. 248; 1 Eng. P.C. 127); see also the cases where the American Courts have applied the same principles, set out in Dana's edition of *Wheaton*, s. 311 *et seq.*

The Crown, in the case now before the Court, did not seize the vessel, or, at any rate, do not ask for its confiscation. But it follows from what I have said that there is no kind of ground for the claim for freight and other expenses, and they must be disallowed.

If it be considered by the Crown—outside the proceedings in this Court—that the conduct of the master was in some sense meritorious, it will be for the Crown to exercise its bounty.

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*Solicitors*—Treasury Solicitor; Stokes & Stokes; Botterell & Roche.

[*Reported by E. C. Trehern, Esq., Barrister-at-Law.*



[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT).

Oct. 25, 28. Nov. 8, 1915.

## THE SORFAREREN.

*Cargo—Neutral Vessel—Enemy Goods—Absolute Contraband—Ignorance of Owners—Declaration of London, 1909, art. 43—General Average.*

*Ante-bellum Shipment—F.o.b. Contract of Sale—Bill of Lading and Insurance Policy Retained by Sellers—Part Payment—Passing of Property.*

Article 43 of the Declaration of London, which provides that "if a vessel is encountered at sea while unaware of the . . . declaration of contraband which applies to her cargo the contraband cannot be condemned except on payment of compensation," applies only to neutral cargo. Therefore enemy cargo of a contraband nature, laden on board a neutral vessel and consigned to a hostile destination, is subject to condemnation without compensation, although not declared contraband until after the vessel has sailed.

Where a claim by the ship against the cargo for a general average contribution exists before the cargo is captured as prize the captors take cum onere of the cargo's contribution to the general average loss.

In June, 1914, pursuant to a contract of December, 1913, entered into between a British company as sellers and a German company as buyers, a cargo of chrome ore was loaded in a Norwegian sailing ship at a port in New Caledonia for delivery at Rotterdam. In accordance with the terms of the contract, which provided a fixed price per ton f.o.b., 50 per cent. to be paid on shipment, the German company paid half the purchase price, effected the insurance, and sent the policy to the sellers before loading. The bills of lading, made out in favour of the sellers, or order, for delivery at Rotterdam, were also sent to and retained by them. The ship sailed on June 9. On

September 6, when she put into Pernambuco, her master heard of the outbreak of war, and instructions were cabled to him by the German company, who were the charterers, that the ship was to proceed to Gothenburg instead of to Rotterdam.

By an Order in Council of October 29, 1914, chrome ore was declared absolute contraband. On November 2 the ship was captured at sea and taken into a British port, and a writ in prize was issued against the cargo.

Claims were entered by the British company, who claimed that the property in the cargo remained in them, and by a Swedish company, who claimed that the German company, as their agents, had bought the cargo for them:—Held, first, that the sellers had not reserved the right of disposal, and that the property in the goods passed to the German company on shipment and part payment; secondly, that on the evidence the alleged agency was an invention, and that the pretended arrangement between the Swedish and German companies was made in the endeavour to convert in transitu enemy goods into neutral goods; and thirdly, that being enemy property, the goods were subject to condemnation without compensation.

Suit for condemnation of cargo.

The following statement of facts is taken from the judgment:

“The *Sorfareren* was a Norwegian sailing vessel. She was chartered by a German company, the Gesellschaft für Elektrometallurgie, m.b.H., of Nürnberg. She carried a cargo of about 3,850 tons of chrome ore. She sailed from Pagoumene, New Caledonia, in June, 1914. The bill of lading was made out in favour of the Chrome Co., Lim. (of St. Swithin's Lane, London), or order, for delivery at Rotterdam.

“Chrome ore is used for the manufacture of ferrochrome, which is an essential ingredient in making armour plate and armour-piercing projectiles. For many years quantities of chrome ore had been imported for the Krupp works at Essen. The usual port of entry for ore intended for the Krupp works was Rotterdam.

“This particular cargo was shipped pursuant to a contract dated December 13, 1913, between the Chrome Co., Lim., as sellers, and the before-named German company, as buyers.

The contract was for a certain quantity, which was dependent upon whether the buyers chartered a sailing vessel or a steamship for carrying the ore. The price was a fixed price per ton, f.o.b. at Pagoumene, upon certain bases of analysis, with *pro rata* variations, depending again upon whether the buyers chartered a sailing vessel or a steamship upon which the cargo was to be shipped.

"The ore was to be discharged at one, two, or three ports, provided that no additional expense beyond three analyses was incurred to the sellers. The bills of lading were to be made out by the shippers to the order of the sellers. Payment of 50 per cent. of the value of the ore at a certain standard was to be made immediately on shipment, and the balance immediately after arrival at port of discharge. Insurance of the goods was to be effected by the buyers at a value of 6s. 6d. per ton over the purchase price. The buyers were to pay the premium and hand the policies to the sellers at Pagoumene. Any necessary advances to the ship were to be made by the sellers at the port of loading, but the buyers were to reimburse to the sellers in New Caledonia such advances on cable advice of the amounts advanced.

"The buyers paid to the sellers in the middle of June, 1914, the sum of 3,987*l.* 12s. 6d., made up of 2,987*l.* 12s. 6d., the 50 per cent. of the value in terms of the contract, and 1,000*l.*, the amount advanced for the ship in New Caledonia.

"On her voyage the vessel put into Pernambuco on or about September 6. There the master of the ship first heard of the war in Europe. He thereupon cabled to the agents for the shipowners, and received instructions to proceed to Gothenburg, instead of to Rotterdam, and to 'sail north of Scotland.'

"According to the affidavit of the secretary of the Chrome Co., Lim., the order to proceed to Gothenburg instead of to Rotterdam was given by the buyers—that is, by the German company.

"On October 29, 1914, by an Order in Council, chrome ore was declared to be absolute contraband.

"About eight o'clock P.M. on November 2, 1914, the vessel was boarded by British naval officers in latitude N. 60° 25' and longitude W. 4° 43', and the vessel and cargo were taken by a prize crew into a British port. •

"It appears that the vessel had been boarded by the German cruiser *Karlsruhe* on September 15, in latitude S.  $1^{\circ} 0' 20''$  and longitude W.  $34^{\circ} 14'$ , and that the boarding officer of the German cruiser had ordered the master not to make an entry of it in his log.

"At the time of the capture by the British cruiser the vessel had sailed about 14,700 miles, and had a further distance to voyage to Gothenburg of about 530 miles.

"In due course the writ in prize was issued, claiming condemnation of the cargo as prize, as enemy property or as contraband of war. In the prize proceedings the cargo was sold, and realised over 16,000*l*.

"Two claims were made to the cargo. One was made on January 18, 1915, by the Chrome Co., Lim. The other was made on January 28, 1915, by the Aktiebolaget Ferrolegeringar, of Stockholm, a Swedish company, hereinafter referred to as the Swedish company.

"No claim has been made by or on behalf of the buyers, the German company.

"The claims are, of course, mutually destructive."

The Norwegian shipowners, in addition to freight, claimed extra remuneration for services rendered in proceeding to Stromness and Glasgow and retaining the cargo on board pending the decision of the Admiralty Marshal as to its disposal.

According to the particulars of claim, the *Sorfareren*, after being stopped by H.M.S. *Africa* off the Faroe Islands on November 2, was taken to Stromness, where she remained until November 20. She was then sent to Glasgow, where the discharge of her cargo began on December 23 and finished on January 11, 1915. Further time was lost in obtaining a dry dock and taking in ballast, and the ship was not ready to sail until February 4.

The shipowners further claimed a contribution from the cargo for a general average loss incurred in consequence of bad weather, which, it was alleged, necessitated the ship putting into Pernambuco.

Stuart Bevan (with him *The Solicitor-General*), for the Crown.  
—The cargo is absolute contraband, and was destined to enemy territory. Rotterdam was the usual port for goods destined for

Krupps at Essen, where chrome ore is used in large quantities in the manufacture of armour plates, &c. After the outbreak of war the destination was changed to Gothenburg, apparently at the instigation of the German buyers, who doubtless anticipated that chrome ore would be declared contraband, and considered Gothenburg a less suspicious port of discharge.

The property in the ore passed to the German company on shipment. The sellers had received half the purchase price, and all the circumstances shewed that they did not intend to retain the *jus disponendi*, particularly the letter which they wrote to the Lords of the Admiralty on September 23 (set out in the judgment).

The Swedish company's claim is not genuine. It is based on an arrangement which was resorted to by the Swedish and German companies after the outbreak of war in order to give the cargo a neutral character.

The cargo is enemy property, and, in addition, is absolute contraband, and therefore, although carried in a neutral vessel, is subject to condemnation.

*Leck, K.C.*, and *W. N. Raeburn*, for the Chrome Ore Co.—These claimants were the owners of the cargo at the time of seizure. They held the bills of lading and the policy of insurance. The goods, therefore, were under their control and disposition, and the property in them had not passed to the German buyers. The contract of sale was voided by the outbreak of war, when it became illegal for British subjects to carry out such a contract with the enemy—cf. *ATKINSON v. RITCHIE* [1809] (10 East, 530, at p. 534). And even if, but for the outbreak of war, it might be held that the property in the goods had passed to the buyers before the date of seizure, by the outbreak of war the rights of the buyers were destroyed, and they could no longer exercise their right to have the bills of lading transferred to them and thereby get delivery of the goods.

[SIR SAMUEL EVANS (THE PRESIDENT).—What facts are there to shew that the sellers regarded themselves as the persons having the ownership and control of the cargo after the ship left New Caledonia?]

They wrote the letter of September 23 to the Lords of the Admiralty, disclosing all the particulars as to the destination

of the cargo and the seller's interest in it; and although the letter does not shew a full appreciation of the legal position with regard to contraband, it does shew a desire to prevent the cargo falling into the hands of the enemy. Before the Order in Council of October 29 the cargo could not have been seized. It was not contraband when loaded, and the master was unaware of the Order declaring chrome ore to be contraband. Therefore, under article 43 of the Declaration of London, the contraband cannot be condemned except on payment of compensation, and the claimants have shewn that they are the persons to whom the compensation should be paid.

*N. L. C. Macaskie*, for the Swedish company.—The property in the goods had passed to the German company, who bought as agents for the Swedish company under an agreement entered into in 1913 between the two companies, who were in intimate business relationship with each other. At the end of September, 1914, when the German company disclosed the position of affairs in a document dated September 29, the cargo, being in a neutral ship and not at that time contraband, was protected under the Declaration of Paris.

The sellers did nothing to shew any retention of the *jus disponendi*—see *VAN CASTEEL v. BOOKER* [1848] (18 L. J. Ex. 9)—and the property in the goods had passed on shipment and part payment to the German company—*DUPONT v. BRITISH SOUTH AFRICA CO.* [1901] (18 Times L. R. 24); and see *JOYCE v. SWANN* [1864] (17 C. B. (N.S.) 84), in which the bills of lading were in the same form as in the present case. The disclosure, therefore, of the real relationship between the parties entitles the Swedish company to make a *bona fide* claim to the cargo.

[*OGG v. SHUTER* [1875] (45 L. J. C.P. 44; 1 C.P. D. 47), *CASTEL v. TRECHMAN* [1884] (Cab. & Ell. 276), *BROWN v. HARE* [1858] (29 L. J. Ex. 6), and *Benjamin on Sale* (5th ed.), pp. 400-401, were also referred to.]

*C. R. Dunlop*, for the shipowners.—The ship is innocent. She left her last port of call long before chrome ore was put on the contraband list, and therefore she comes directly within the provisions of article 43 of the Declaration of London. Under similar circumstances freight was allowed to the owners in the case of *THE KATWYK* (*ante*, p. 282).

[*Stuart Bevan*.—The Procurator-General does not object to a reference to assess the freight in the terms of the judgment in *THE JUNO* (*ante*, p. 151).]

The shipowners are also entitled to some compensation for the detention of their vessel for more than two months. The principles laid down in *THE JUNO* (*ante*, p. 151) do not apply so far as compensation is concerned, because that was a case of enemy goods on a British vessel, which, therefore, had to discharge them.

[*SIR SAMUEL EVANS* (*THE PRESIDENT*).—Is not this part of the claim covered by the decision in *THE KATWYK* (*ante*, p. 282)?]

The facts are different. In *THE KATWYK* (*ante*, p. 282) the Court was invited by counsel for the Crown to disallow any claims for freight or expenses on the ground that the shipowners were connected with the firm of Krupps, and knew that the Dutch destination was not the real destination, and that they were carrying a cargo for Krupps which might at any time be declared contraband. The prejudice which existed in *THE KATWYK* (*ante*, p. 282) does not exist in the present case, and the shipowners, who rendered the captors all the assistance they could, are entitled to generous treatment.

Lastly, the shipowners are entitled to a contribution from the proceeds of the cargo, if condemned, in respect of the general average loss incurred by the ship having to put into Pernambuco in consequence of bad weather. There is no prize case in which this question has been considered, but it is submitted that, independently of contract, where a general average expenditure has been incurred for the general safety of the ship and cargo, and from which the Crown derives a benefit, the captors of the cargo take it *cum onere*—see *UNITED STATES v. WILDER* [1838] (3 Sumner, 308) and *Arnould's Marine Insurance* (9th ed.), ss. 948, 973. The claim should be referred to the Registrar.

*Stuart Bevan*, in reply, said that there was no precedent for a claim for general average being allowed in prize proceedings. General average claims were made up after a vessel arrived at her destination. In this case the *Sorfareren* had never arrived at the port of destination. Apart from that, no *prima facie* case had been made out on the facts that a general average loss had been incurred. The claim should be disallowed.

SIR SAMUEL EVANS (THE PRESIDENT).—I have come to the conclusion that the claim of the Swedish company must be disallowed. I say that now so that they may be dismissed from the proceedings without incurring further expense.

I will consider my judgment upon the questions arising between the captors and the shipowners and the British company. When I give my decision on those questions I will give my reasons for disallowing the claim of the Swedish company.

*Cur. adv. vult.*

Nov. 8.—SIR SAMUEL EVANS (THE PRESIDENT) stated the facts set out above, and continued: Broadly speaking, the ground of the claim of the Chrome Co., Lim., is that at the time of the capture they were owners, because, according to their contention, they had reserved the right of disposal of the goods.

They alleged a further ground, which I confess I find it difficult to understand, which they state in their claim as follows: "The claimants further say that by reason of the outbreak of war on August 4, 1914, between Great Britain and Germany, the contract for the sale of the goods became, and was, annulled; and further that, by reason of the Royal Proclamation against trading with the enemy, it became and was illegal and impossible for the claimants to deliver the goods to the German purchasers."

As to this, the goods at the time of capture were on their way to the port of discharge for delivery, and no steps were taken by the sellers to try to prevent or put an end to the voyage. I conceive that the real question upon their claim is whether under the contract the property in the goods had passed from them to the buyers.

The ground of the claim of the Swedish company, again broadly speaking, was that the goods were their property, having been bought for them by the German company as their agents. An essential ingredient in this claim is that the property had, at any rate, passed from the sellers.

I will first deal with the claim of the British company. They dealt only with the German company, and knew nothing whatever of the Swedish company in relation to this transaction. I cannot find that they knew even of the existence of the latter



company before the capture. The terms of the contract between the British company and the German company, and the dealings between them, have been sufficiently set out to enable the question of the transfer of the ownership to be determined. I will not repeat them.

I deem it to be clear that the property passed on the shipment and part payment, and that there was no reservation whatsoever by the sellers of the right of disposal of the goods. Their whole conduct shewed that there was no intention upon their part to reserve such a right. The result, in fact, of giving effect to their claim would be strange indeed. It would mean that, in addition to 2,987*l.* 12*s.* 6*d.* already paid to them by the buyers in part payment of the purchase price, a sum of over 16,000*l.* (the proceeds of the sale of the goods) would also be released and paid over to them, and they would thus be receiving 19,000*l.* instead of the unpaid balance, which they estimate at some figure between 3,000*l.* and 4,000*l.*

If the strict application of the law involved this result, the Court could not, and would not, prevent it. But, as I have said, in my opinion, according to law, the Chrome Co., Lim., had transferred their property in the goods to the German buyers, and the extraordinary result above described does not ensue.

Their holding of the bills of lading, and of the policy of insurance, did not preserve the property in them in the circumstances. Their object in obtaining and holding these documents was simply to secure for their greater protection the payment of the balance.

It is a comfort to the Court, and may possibly be some consolation to the claimants in the face of an adverse decision, to find that this view appears to have been entertained by themselves before the prize proceedings were instituted, as is shewn by the following letter, which was written for them by their secretary to the Lords of the Admiralty:

"Chrome Company, Ltd., September 23, 1914. My Lords,—  
s.v. *Sorfareren*. In view of the present situation, the directors of this company deem it their duty to disclose to you the following particulars in regard to the cargo of chrome ore on the above vessel, such cargo being undoubtedly intended for an alien enemy, and chrome ore being used in the manufacture

of armour-plates. The vessel, which is a Norwegian sailing vessel, was tendered to us at Pagoumene, New Caledonia, by the Gesellschaft für Elektrometallurgique m.b.H., Nürnberg, in fulfilment of a contract we entered into with them in December, 1913, to supply 3000/6000 tons of chrome ore f.o.b. Pagoumene.

"The quantity loaded is said to be 3,855 tons, and the vessel left Pagoumene on June 9, 1914, for Rotterdam. Under the terms of the contract, the price of the ore was payable as to half (approximately) on shipment and the balance on arrival at port of discharge in Europe, the exact value of the cargo being dependent upon the chromium contents of the ore as ascertained by analysis on this side and its actual weight on arrival, exclusive of moisture.

"The provisional payment amounting to 2,987*l.* 12*s.* 6*d.*—was duly made on shipment, and for our protection, pending receipt of the balance, the bills of lading were in the terms of the contract made out to our order and are now, together with the marine insurance policy, in our possession. Being interested in the cargo to the extent of the unpaid balance, which we estimate to be about 3,700*l.*, we made inquiries from time to time as to the movements of the vessel, with a view to obtaining possession of the ore, and only recently heard that she arrived at Pernambuco on September 8, and was there ordered to proceed direct to Gothenburg, although the bills of lading are made out for Rotterdam. The charterparty dated March 5, 1914, stipulates, it is true, Rotterdam, Hamburg or Gothenburg as the destination. So far as we know, however, there is no other cargo on board necessitating her calling at Gothenburg.

"In the event of your Lordships taking steps to seize the vessel and cargo as prize, and the cargo being condemned as contraband of war, we may lose the above mentioned 3,700*l.* My directors, therefore, beg that you will take into consideration our interest as above set forth, and regard in a favourable light our efforts to prevent the ore falling into the hands of the enemy, and we should be glad to hear whether your Lordships could see your way to pay us out of the proceeds of the sale what would be due to us under normal circumstances and to give us the preferential right of buying the cargo.

"We hear, unofficially and incidentally, that the orders to

the captain of the vessel are to proceed to Gothenburg by way of the North of Scotland. I would add that the vessel left Pagoumene on June 9, 1914, so that she has taken about three months to get from there to Pernambuco, whither she went direct, so far as we know. If any further information is desired, I shall be happy to call at the Admiralty by appointment. I have the honour to be your Lordships' obedient servant, (Signed) H. W. C. DERMER, secretary. The Lords Commissioners, H.M. Admiralty, Whitehall, S.W."

The claim of the Chrome Co., Lim., must be disallowed.

The other claimants to the cargo are the Swedish company. Appearance was entered on their behalf on December 21, 1914. So far as the Court has been informed, nothing was heard of the Swedish company in connection with the transaction or with the German company until a couple of days before.

The solicitors for the Swedish company wrote a letter of December 19 to the solicitors for the Chrome Co., Lim., in which they said; "Your clients were the vendors of certain chrome ore, of which our clients are the derivative purchasers."

According to their formal claim, which was made on January 28, 1915, the ground of their claim was that the German company acted in the purchase as the agents of the Swedish company. It was alleged in the claim that "by an instrument in writing dated September 29, 1914, the German company formally and solemnly placed on record the fact that the said cargo of chrome ore was bought by them at the request of and as agents for and on behalf of these claimants (the Swedish company) under an agreement made between them as early as the month of October, 1913, or thereabouts."

A copy of this document was produced. It purports to be a contract or agreement. It contains various terms (to which it is not necessary to refer in detail) which are entirely inconsistent with the agreement of December 13, 1913, for the purchase by the German company from the sellers.

I doubt whether this contract or agreement was made on the date or dates given. The arrangement, whatever it was, is suspicious; it savours greatly of a scheme set afoot to try to shew that the goods belonged to neutrals, and not to enemy subjects. It purports to give effect to some agreement between the two companies of a year earlier, when, according to the

account given by the managing director of the Swedish company, the two companies "were in very intimate connection with each other," in consequence of which no arrangement was made with the Germany company with reference to the price and the terms: "leaving to the German company to act in the best possible way, and after, the purchase being made, settle our mutual transaction" (*sic*).

An extraordinary document purporting to be dated October 31, 1914, was referred to as having passed between the German company and the Swedish company. I refrain from attempting to state its contents or operation, and will accordingly set it out as translated in full: "Nürnberg, October 31, 1914. Transfer. Aktiebolaget Ferrolegeringar. Stockholm. According to receipt issued by the firm of Chalas & Sons, Finsbury Pavement House, Finsbury Pavement, London, E.C., dated June 19, 1914, we have against this firm a claim of 3,987l. 12s. 6d. The above-mentioned claim we by this transfer to you unconditionally and with full title. We have accordingly debited your account with the same amount. Yours truly, Gesellschaft für Elektrometallurgie mit beschränkter Haftung, Max Loewi, Dr. Forchheimer."

As already stated, this amount consisted of a part payment of the purchase price to the sellers, and of a repayment of an advance made by the sellers to the ship. It is difficult to understand how it could be regarded as a claim against the sellers or their agents, Chalas & Sons, which could be transferred to the Swedish company.

No correspondence or accounts between the Swedish and German companies relating to this or any similar business dealings was produced. No satisfactory explanation was given of why the Swedish company wanted its goods shipped to Rotterdam or why the destination was afterwards, and in the course of the voyage, changed to Gothenburg. In forming my judgment upon the facts, I cannot come to any other conclusion but that the alleged agency was an invention, and that the pretended arrangement was made merely in order to attempt to cover up enemy goods by a transfer, *in transitu*, to neutrals.

As I intimated at the trial, I accordingly disallow the claim of the Swedish company. I find that at the time of the capture

the goods were enemy property belonging to the German company and destined for Germany.

It remains to be considered how they should be dealt with by this Court. Article 43 of the Declaration of London was referred to. As an article of the Declaration it has no force, but it will be remembered that it was not excepted when the Order in Council adopted and applied with modifications and alterations some of the terms of the Declaration. The article is as follows:

“If a vessel is encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband which applies to her cargo, the contraband cannot be condemned except on payment of compensation; the vessel herself and the remainder of the cargo are not liable to condemnation or to the costs and expenses referred to in article 41. The same rule applies if the master, after becoming aware of the outbreak of hostilities, or of the declaration of contraband, has had no opportunity of discharging the contraband. A vessel is deemed to be aware of the existence of a state of war, or of a declaration of contraband, if she left a neutral port subsequently to the notification to the Power to which such port belongs of the outbreak of hostilities, or of the declaration of contraband respectively, provided that such notification was made in sufficient time. A vessel is also deemed to be aware of the existence of a state of war if she left an enemy port after the outbreak of hostilities.”

It will be observed that the vessel is personified: and the knowledge under consideration is that of the vessel. The *Sorfareren*, when encountered at sea, was aware of the outbreak of hostilities, but was not aware, or, at any rate, there was no evidence that she was aware, of the<sup>3</sup> declaration of contraband affecting her cargo. The declaration of contraband was made on October 29. What is the meaning of the provision that the contraband in such a case cannot be condemned except on payment of compensation? Who has the right to claim compensation or to resist condemnation without compensation? Of course, contraband may be not only carried on neutral vessels, but may also be the property of neutrals.

The Declaration of Paris excepted contraband of war from the protection agreed to be afforded to enemy goods on neutral

vessels, and to neutral goods on enemy vessels, even when the contraband goods were neutral property.

The aim and object of these articles of the Declaration of Paris were the safeguarding in favour of neutrals of their shipping and their property.

In my opinion article 43 of the Declaration of London was not intended to save from condemnation contraband belonging to the enemy. If the article were construed strictly, it might be contended with some reason that the only protection intended was in favour of neutral vessels against the consequences to them of the condemnation of the cargo or certain proportions of it. It is silent as to the effect of knowledge or want of knowledge of the contraband nature of the goods on the part of the owners of the goods.

I express no final opinion upon this point. But at the most, I think the article was only intended to give, and only does give, protection to neutrals whose goods were being carried at sea when their owners were unaware of the declaration of contraband, by awarding to them compensation on condemnation of their goods, which were, in fact, although not with their knowledge, contraband at the time of capture. This is an intelligible extension in favour of neutrals of the provisions in their favour in the Declaration of Paris.

Having given the matter my best consideration, I decide that contraband belonging to the enemy remains liable to condemnation without compensation. It will be remembered that the Report of the Drafting Committee to the Naval Conference, which consisted of representatives of Germany, the United States of America, Austria-Hungary, Spain, France, Great Britain, Italy, Japan, the Netherlands, and Russia—which is generally known as Monsieur Renault's Report—is declared by the Order in Council, already mentioned, to be an authoritative report, to which this Court is directed to have regard. That report says as to article 43: "This provision is intended to spare neutrals who might, in fact, be carrying contraband, but against whom no charge could be made."

This confirms me in the opinion I have expressed, which, indeed, I should have formed, and did form, without reference to the report.

If this opinion should not obtain the approval of the appellate

tribunal, there are other grounds, which I shall state briefly, why, in any event, in this case the contraband should be condemned without compensation.

The first is, that compensation could only be given to the owners of the goods, and the owners, according to my decision, are not before the Court to ask for it. And no claim having been made by the true owners within six months of the capture, the goods are subject to condemnation according to the Prize Rules.

The other ground is, that even if the owners were before the Court, their conduct would preclude them from obtaining an award for compensation from the Court. I am prepared to decide that compensation should only be given to owners who acted not only in ignorance, but innocently and honestly, both in relation to the shipment and to the presentation of their claim and case before the Court.

Here there has been, as I find, a dishonest attempt, in which the German company acquiesced and took part, to persuade the Court that the German company only acted in the purchase as agents of a neutral company. This is not a case of honest mistake on their part. There is no place for error in such a simple business transaction and on such a pure question of fact. In thus deciding I conceive that I am acting in accordance with the old-established principle of the Court, which has consistently and effectively set its face against attempts to impose upon it. I shall not elaborate the principle by discussing the authorities. It is sufficient to refer in illustration of it to such cases as *THE ODIN* [1799] (1 C. Rob. 248; 1 Eng. P.C. 127), *THE EENROM* [1799] (2 C. Rob. 1; 1 Eng. P.C. 168), *THE ROSALIE AND BETTY* [1800] (2 C. Rob. 343; 1 Eng. P.C. 246), and *THE RICHMOND* [1804] (5 C. Rob. 325).

For the reasons stated I pronounce judgment of condemnation against the cargo as lawful prize.

The shipowners have made a claim for freight, for remuneration for the use of the ship or loss by delay, and for contribution from the cargo to alleged general average loss.

As to the first head of claim, I order a reference to the Registrar and Merchants to ascertain what ought to be paid

in lieu of freight, according to the rule laid down in *THE JUNO* (*ante*, p. 151).

As to the second head, as I intimated at the trial, there are no circumstances in this case upon the principles which the Court applies to justify any part of the claim. Till a late date, according to the evidence, the shipowners' agents refused to allow the cargo to be discharged. It was not suggested that there had been any misconduct or unnecessary delay on the part of any of the authorities.

As to the third head, the claim raises a question of principle which this Court has not heretofore been called upon to decide. It is whether captors of cargo take it with the burden of a proportionate contribution to general average loss incurred before the capture.

Counsel for the shipowners stated that there was a general average loss arising from the vessel putting into Pernambuco. There are not sufficient facts before me to justify my expressing any definite opinion upon that point, but I entertain considerable doubt upon it. I do not, by dealing with the legal aspect of the claim in these prize proceedings, wish to encourage the shipowners to proceed with it. If they are advised to do so, it will be at their peril as to costs, which would be deducted from any sum allowed in respect of freight. But, assuming a general average loss to exist, and as the position of shipowners in such a case raises a question of general importance in regard to captures of cargo as prize, I will pronounce my opinion upon the principle of law involved.

I have dealt in other cases—for example, *THE MARIE GLAESER* (*ante*, p. 38) and *THE ODESSA* (*ante*, p. 163)—with the general question affecting liens on ships and cargoes captured, and with the authorities relating to them in this and in other countries. I refrain from again traversing the same ground. The main distinction is between liens imposed by the general law of the mercantile world independent of any contract, and those which arise from private engagements or contractual relations between parties—see *THE TOBAGO* [1804] (5 C. Rob. 218; 1 Eng. P.C. 456), *THE FRANCES* [1814] (8 Cranch, 418), and *THE CARLOS F. ROSES* [1899] (177 U.S. Rep. 655).

The nature of a claim for general average was described clearly by the Privy Council in the case of *CLEARY v. McANDREW*;



THE CARGO EX GALAM [1863] (2 Moo. P.C. (N.S.) 216, at p. 235), as follows: "There remains the question of the claim for general average. On principle this claim seems to stand on the same reason as freight. It is a loss incurred for the general benefit of the ship and cargo, to which those who have received the benefit are by law liable to contribute rateably. And for this claim the master who has incurred the expenses has a lien on the goods. It is a possessory lien at common law, by virtue of which he is entitled to hold the goods till his lien be satisfied."

And the Privy Council decided that the claim for freight and general average stood upon the same footing and had the first right against the funds in Court.

There is also a statement by Lord Stowell in a case of prize in regard to THE HOFFNUNG [1807] (6 C. Rob. 383; 1 Eng. P.C. 583) to the effect that cases of average on the part of the ship against the cargo were not infrequent in his time.

On principle it appears to me to be right that where a claim of general average by the ship against the cargo exists before the cargo is captured the captors take *cum onere* of the cargo's contribution to the general average loss. On the assumption that the shipowners can establish a case of general average loss I order a reference to the Registrar and Merchants to assess the portion to be borne by the captured cargo, and order payment of the sum assessed, if any, out of the proceeds of the prize.

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*Solicitors*—Treasury Solicitor; Ingle, Holmes, Sons & Pott; Nicholson, Graham & Jones; Botterell & Roche.

[Reported by E. C. Trehern, Esq., Barrister-at-Law.]

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[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). Nov. 4, 22, 1915.

THE EUMAEUS.

*I. Domicile—Commercial Domicile—Exterritoriality—Partnership Firm at Shanghai—Registration at German Consulate—*

*British Partners—Registration at British Consulate—Severance of Connection with Partnership Firm.*

*II. Enemy Company—Branch Office in Allied Territory—Claim by Branch Office—Trading with Enemy Proclamation of September 9, 1914.*

*III. Enemy Cargo—Pledge to Neutral Bankers—Documents of Title Held by British Agents—Effect of Outbreak of War—Right of Pledgors to Redeem.*

*I. A firm consisting of two British and two German subjects carrying on business at Shanghai was registered at the German Consulate as a German firm in accordance with the regulations whereby the European communities, to which China has granted extraterritorial privileges, are governed by the laws of their respective countries. The two British partners, who resided in Shanghai, were also registered as British subjects at the British Consulate. Neither of the German partners resided in Shanghai. Goods belonging to the firm having been seized as prize, they were claimed as being the property of the firm as neutrals, and alternatively as the individual property of the partners as neutral and British subjects:—Held, first, that the firm could not be treated as a neutral house of trade, and that for all purposes of prize it must be regarded as a German firm carrying on business in a German colony; secondly, that, under the circumstances, none of the partners had acquired, or could acquire, a neutral commercial domicile, and that the shares in the proceeds of the goods attributable to the German partners must be condemned; and thirdly, that, as regards the shares of the British partners, the case must be adjourned for further evidence as to what measures, if any, were taken by them to sever their connection with the firm on the outbreak of war.*

*II. Certain other parcels of goods seized as prize were claimed by the shippers, the Japanese branch office of a German company with its head office at Hamburg. The goods were consigned by the claimants from Japan to their order, Hamburg. Section 6 of the Trading with the Enemy Proclamation (No. 2) of September 9, 1914, provides that "where an enemy has a branch locally situated in British, allied, or neutral territory, not being neutral territory in Europe, transactions by or with such branch shall not be*

*treated as transactions by or with an enemy":—Held, that this proclamation did not protect the goods from condemnation; that the sole question was whether or not the goods were German goods; and that the goods must be regarded as the property of the German company, and not of the Japanese branch.*

*III. The enemy owners of goods seized as prize, who have pledged them to neutral bankers before war, do not lose their right to redeem the goods by reason of the outbreak of war, although the documents of title to the goods may be held by British agents of the bankers, who are prohibited from commercial intercourse with the pledgors; and the bankers are merely in the position of pledgees whose claims cannot be recognised in the Prize Court—THE ODESSA (ante, p. 163).*

This was a suit for the condemnation of cargo laden on board the British steamship *Eumaeus*, which sailed from Japanese and Chinese ports in July, 1914, bound for British and German ports. The goods in question were seized on the arrival of the vessel in the Port of London in October, 1914.

An appearance was entered on behalf of Arnhold Karberg & Co., of Shanghai, in respect of thirty-three bales of feathers shipped "to order, Bremen." The facts relating to this claim are fully stated in the judgment.

Appearances were also entered on behalf of the Kobe branch of the Japan Export Co., m.b.H. of Hamburg, in respect of (a) 300 cases of antimony shipped by the claimants to their order, Hamburg; (b) twenty-five cases of vegetable wax shipped "to order, Hamburg"; and (c) 100 cases of camphor shipped "to order, London, Havre, or Hamburg." A claim in respect of the cases of antimony was also made by the Hong-Kong and Shanghai Bank, whose Kobe branch had made advances and taken up the bills of lading, and in respect of the vegetable wax and camphor by the International Banking Co. of New York, who claimed as holders of the bills of lading and alternatively as pledgees.

*Maurice Hill, K.C., and A. Neilson, for the Procurator-General.*

*Stuart Bevan, for Arnhold Karberg & Co.*

A. M. Latter, for the Kobe branch of the Japan Export Co. and the Hong-Kong and Shanghai Bank.

C. R. Dunlop, for the International Banking Co. of New York.

[The arguments on the claim of Arnhold Karberg & Co. sufficiently appear from the judgment. In addition to the cases there cited, the following were also referred to: *THE DANOUS* [1802] (Lords, March 17, 1802), reported in a note to *THE NAYADE* (4 C. Rob., at p. 255), *THE HARMONY* [1800] (2 C. Rob. 322; 1 Eng. P.C. 241), and *NIGEL GOLD MINING Co. v. HOADE* [1901] (70 L. J. K.B. 1006; [1901] 2 K.B. 849).

For the Kobe branch of the Japan Export Co., m.b.H., it was argued that, although the head office of the company was at Hamburg, the property in the goods was in the branch; that Japan permitted branch offices of German companies, under licence, to transact their business; and that by section 6 of the Trading with the Enemy Proclamation of September 9, 1914,<sup>1</sup> Great Britain also permitted trade by and with branches of enemy firms established in friendly territory; and *USPARICHA v. NOBEL* [1811] (13 East, 332), *THE HOFFNUNG* [1799] (2 C. Rob. 162), *THE NEPTUNUS* [1807] (6 C. Rob. 403; 1 Eng. P.C. 595), *Chitty's Law of Nations* (1812), pp. 273-9, 356, and *Wheaton's International Law* (4th Eng. ed.), s. 550, were referred to.

For the International Banking Co. of New York it was argued that on the outbreak of war the right of the pledgors to redeem their goods was lost as completely as if the pledgees had exercised their power of sale—cf. *THE NINGCHOW* (*ante*, p. 288)—for the bills of lading had been sent to agents of the pledgees in England, who would have been guilty of the offence of trading with the enemy if they had communicated with the pledgors or permitted them to redeem the goods. This point was not taken in *THE ODESSA* (*ante*, p. 163), an admission having been made in that case that the goods were enemy property.]

SIR SAMUEL EVANS (THE PRESIDENT).—The claimants, the

(1) Trading with the Enemy Proclamation (No. 2), September 9, 1914, s. 6: "Provided always that where an enemy has a branch locally situated in British, allied, or neutral territory, not being neutral territory in Europe, transactions by or with such branch shall not be treated as transactions by or with an enemy."

Japan Export Co., m.b.H., have put in a claim in these proceedings to thirty cases of antimony, which formed part of the cargo laden on board the *Eumaeus*, consigned from Japan on its way to Hamburg.

The ground upon which the claim has been put, and argued by Mr. Latter, is that the Japan Export Co., m.b.H., in whom the property was, is in some respects a different entity from the Japan Export Co., m.b.H., of Hamburg.

Looking at the documents, I have no doubt that it is a mere agency—call it a branch if you like—of the head office in Germany, carrying out all the transactions in accordance with the directions of the head office in Germany and on behalf of the head office in Germany. It is said, however, that the Japan Export Co., of Kobe, by the proclamation of September 9, 1914, was in some way permitted by the Crown, as representing this country, to carry on trade with Germany. I fail to appreciate the argument. The proclamation of September 9, 1914, is a proclamation by the King to his subjects, or to other persons therein named resident in this country, with regard to their rights to trade with Germany. It has nothing at all to do with the question as to what a branch in Japan may or may not do with its head office in Germany. The sole question which I have to determine here, in my view, is whether or not these goods belonged to Germans at the time of seizure on October 12. In my judgment it is quite clear that the goods were the property of the Japan Export Co., m.b.H., Germany, and as enemy property they are subject to condemnation. A claim was put in in respect of those goods by pledgees, but that claim is no longer proceeded with.

There are three other items also of goods consigned by the Japan Export Co., m.b.H., from Kobe to Hamburg—twenty-five cases of vegetable wax, fifty cases of camphor, and another fifty cases of camphor. In respect of those three portions of the cargo, the claim made is on behalf of the International Banking Corporation of New York. Mr. Dunlop, who has great experience in these cases, and who had experience also in the case of *THE ODESSA* (*ante*, p. 163), says that he is in a position in this case to say that the International Banking Corporation of New York ought not to be regarded merely as pledgees from the moment of the outbreak of war. He argues that

immediately you have the outbreak of war, if there is a pledgor and pledgee, to whatever nationality they belonged, if the pledgor happens to be an enemy—if you have a German pledgor and an American bank pledgee—immediately on the outbreak of war the pledgor loses all right to redeem his property, and the goods must be regarded as if at that moment the property were transformed from the pledgor to the pledgee. That is a point which was not taken in *THE ODESSA* (*ante*, p. 163). I may say, with great respect to Mr. Dunlop and to his acuteness in argument, that it was not taken because nobody thought it was worth while to take the point.

I hold that this company, the International Banking Corporation of New York, are merely pledgees, and in the same position as pledgees in the case of *THE ODESSA* (*ante*, p. 163), and that their claim must fail. Those three parcels of goods, being enemy property, must also be condemned.

Then there are three other parcels consisting of eleven cases of asbestos, two parcels of intestines, and another two parcels of intestines, consigned to Hamburg, which were clearly enemy property; and, moreover, more than six months have elapsed, and there is no claim in respect of them.

Therefore, in respect of all the cargoes, condemnation of which is claimed in this writ—except the thirty-three bales of feathers, which are the subject of a claim by Arnhold Karberg & Co.—I pass sentence of condemnation against the goods, or against their proceeds if they have been sold.

Important questions have been raised on the claim of Arnhold Karberg & Co., to which I desire to give more consideration than I can to-day, and I shall reserve my judgment in that case for a few days.

*Cur. adv. vult.*

#### THE CLAIM OF ARNHOLD KARBERG & Co.

*Nov. 22.* — *SIR SAMUEL EVANS* (THE PRESIDENT). — The claimants describe themselves as “Arnhold Karberg & Co., of Shanghai, in the Republic of China, importers and exporters.” Up to the outbreak of war they were a firm consisting of four partners. They were Harry Edward Arnhold and Charles Herbert Arnhold, both British subjects, and Ernst Goetz and Max Niclassen, both German subjects. The shares of the

British subjects were 43 per cent., and those of the German subjects 57 per cent.

The two British subjects had lived at Shanghai for some years. Goetz lived in London and various places, and according to the deed of partnership was to reside abroad at such places as Harry Arnhold should direct. After the war he was interned in this country as a German. Niclassen lived at Berlin, and up to the date of the war attended to the business of the firm's Berlin house.

The claim was made upon the footing that the firm's business was carried on from Shanghai as the head office. The firm was registered at Shanghai in the German Consulate as a German firm. It was admitted that at the time of seizure the goods seized, and now claimed, were the property of the firm at Shanghai.

They were claimed: (1) As the property of the Shanghai firm in the character of neutral subjects. Alternatively, (2) the shares of the respective partners were claimed as the property of neutral and British subjects respectively.

As to claim (1), it was contended that the firm had a neutral domicile in Shanghai.

As to claim (2), apart from alleged commercial domiciles, it was admitted that the two German partners were subjects of the German Empire, and that the other two partners were subjects of this country.

The claim has to be considered both from the point of view of the firm and of its constituent partners in reference to the law of prize.

As to the firm, it was contended that its trade was carried on in neutral territory, and it ought therefore to be treated as a neutral house of trade, and that in consequence its property was exempt from confiscation by capture at sea or seizure in port. Assuming, only for the purpose of dealing with this argument, that the firm could be treated as a separate entity apart from its four members, it is conceded that it was a firm registered at the German Consulate in accordance with German law, and that, so far as the business and assets or any of the partners were within the jurisdiction or control of the German Consular authorities in China, the firm was liable to be treated in all respects as subject to German law.

The firm itself after the war took up the position, in reference to some British merchants, that it was registered as a German firm, and that as such it was prohibited by the German authorities in Shanghai from carrying out its contracts with one British customer.

Shanghai is a treaty port in the East, and German merchants are, like the merchants of Great Britain and other countries, governed by the law of their own country in their commercial business carried on in that locality. I shall refer more particularly to the relationship of Europeans trading or resident in Oriental countries hereafter, when considering the question of the commercial domicile of subjects of Western States carrying on business at the present day in Eastern countries.

Having regard to the establishment of registration of the firm of Arnhold Karberg & Co., in Shanghai, as a German firm, subject to German laws under treaty with China, and with extraterritorial rights and privileges, I am of opinion that the firm should be treated in all matters relating to the jurisdiction of a Prize Court in time of war as if it were established in Germany itself. In other words, the business at Shanghai must be regarded as enemy business carried on in an enemy house of trade.

A similar result must, in my view, follow from a consideration of the position of the firm, not as a separate entity, as was contended, but from the more accurate position of a partnership of the four individual partners. They, although subjects of different States, agreed to carry on the business in co-partnership in Shanghai, and as such were the joint owners, in varying shares or proportions, of the goods now claimed.

What were their individual national characters in relation to this business? Had such of them as were enemy subjects acquired a commercial domicile in a neutral country so as to give exemption to their property from confiscation *jure belli*? Had such of them as were British subjects acquired such a domicile as would protect them if engaged in business with enemy partners? Had the partners only joined in a house of trade entitled to be regarded as a neutral house of trade? Or were the British subjects partners in an enemy house of trade, with the obligations of withdrawing, and subject to the penalties of not withdrawing, in proper course on the outbreak of war?



The celebrated case of *THE INDIAN CHIEF* [1800] (3 C. Rob. 12; 1 Eng. P.C. 251) was referred to as the great authority upon the doctrine of the immiscible character of merchants of Western countries residing and carrying on trade in Oriental lands. For the spirit of the doctrine, discussed with such felicity, dignity, and wealth of language, that classical judgment will always be referred to. But it must be remembered that the case dealt with what was known as the "factory" system, which has long since passed away. The "factory" (to use the words of Sir Francis Piggott, ex-Chief Justice of Hong-Kong) "was an establishment tolerated by the State in which it was set up, which, apparently for the convenience of all parties, was withdrawn, as well as all persons therein residing, from the operation of local laws."

The law applicable to this archaic and obsolete system is that which was laid down by Lord Stowell in *THE INDIAN CHIEF* (3 C. Rob. 12; 1 Eng. P.C. 251), and it is sufficiently stated in this passage from his judgment:

"It is to be remembered that wherever even a mere factory is founded in the Eastern parts of the world, European persons trading under the shelter and protection of those establishments are conceived to take their national character from that association under which they live and carry on this commerce. It is a rule of the law of nations applying particularly to those countries. . . . In China, and I may say generally throughout the East, persons admitted into a factory are not known in their own peculiar national character; and, being not admitted to assume the character of the country, they are considered only in the character of that association or factory."

Since the days of *THE INDIAN CHIEF* (3 C. Rob. 12; 1 Eng. P.C. 251) a vast change has come over the conditions of commerce between Western and Eastern States. Lord Stowell quoted the line *Doris amara suam non intermiscuit undam*. But the sea, never changing, and yet ever changing within the limits set to the waters, has ceased to be a separating influence between distant lands in times of peace, especially since the advent and with the development of steam transit. It has rather become a means of union than of separation in the world of commerce. And Eastern nations have long grown out of the state of necessity for the factory system. Commerce has been fostered,

and the great States of the East have been willing to grant to subjects and citizens of the European nations extraterritorial privileges of an extensive kind under treaties and otherwise, which relieve those to whom they are granted from obedience to the laws of the Oriental States in which they reside and carry on business, and permit them to be governed, more especially in relation to their commerce, by the laws of their own States.

Under treaty China has accorded the rights and privileges of extraterritoriality to the chief European States. In Shanghai there is a British Supreme Court. In other parts of China there are the usual Consular Courts. It is not necessary to give any details of the privileges. The British communities are now regulated by the China and Corea Order in Council of 1904. Similar regulations exist for other European countries, including Germany; and it may be stated shortly that the effect of these is that not only are the respective European communities governed by their own national laws among themselves, but that the Chinese authorities are precluded from exercising any authority in any disputes between the subjects or citizens of the European States respectively, and other foreigners.

Every British subject is required to register himself annually in the prescribed Consulate—see China and Corea Order in Council, 1904, s. 162. The subjects of other States have to do likewise. As one writer has said: "The register is essential . . . in order that the protecting duties of the Minister may be properly exercised; it would be essential even if there were only the national and the British communities; it is ten times more important when the foreign community is composed of many nationalities. If the sheep upon the mountains are not marked, how shall the shepherds know their sheep?"

In the present case the two British subjects registered themselves in the British Consulate. They appear, however, to have been prevailed upon to allow the firm to be registered in the German Consulate as a German firm. This has been explicitly stated in the affidavits in the present case. The fact and the results were more fully stated in an affidavit by the chief partner, Mr. Harry E. Arnhold, in certain prize proceedings in the Prize Court at Alexandria in *THE DERFFLINGER* (No. 3) (*post*, p. 643) as follows:

"The firm of Arnhold Karberg & Co., for the purposes of its business in China, has been and remains registered at the German Consulate General at Shanghai, in accordance with German law, as a German firm, and so far as the business and assets or any of the partners in the said firm are within the jurisdiction or control of the German Consular authorities in China, the said firm is liable to be treated in all respects as subject to German law. In particular, the said German Consular authorities will not, so far as their jurisdiction extends, permit the said firm to be dissolved or wound up, or its property or assets to be dealt with in derogation of the rights of the German partners in the firm, and will not permit the British partners to take over the property and assets of the said firm, or to carry on its business otherwise than for the benefit of all partners in the firm."

That was the character which the partners, by their action, gave to the firm.

In this case I am not called upon to express any opinion upon the question whether at the present day a British subject can acquire a civil domicile in an Oriental country like China.

TOOTAL'S TRUSTS, *In re* [1883] (52 L. J. Ch. 664; 23 Ch. D. 532), may or may not be good law. It has been much criticised by jurists, and has recently been dissented from in a judgment of the Supreme Judicial Court of Maine in *MATHER v. CUNNINGHAM* [1909] (105 Maine Reports, 326; 74 Atlantic Reporter, 809). The decision in the case now before the Court does not involve that question. Neither of the British partners claims to have acquired such domicile. They assert their British citizenship. The two German partners likewise do not seek to renounce their German domicile.

Nor is it necessary to pronounce a decision upon the general question whether for purposes of the law of prize a commercial domicile can be acquired by Europeans in Eastern countries. I think it must depend upon circumstances. For instance, it is difficult to find any good reason why a British subject might not have a commercial domicile in a country like Japan, where consular jurisdiction and extraterritorial privileges have been abolished for some years. Domicile is a term which eludes scientific definition.

But the definition of Professor Dicey of commercial domicile,

as "such residence in a country for the purpose of trading there as makes a person's trade or business contribute to or form part of the resources of such country, and renders it therefore reasonable that his hostile, friendly, or neutral character should be determined by reference to the character of such country" (*Dicey's Conflict of Laws* (2nd ed. 1908), p. 742), is sufficiently clear and accurate for practical purposes.

Neither of the German partners was resident in Shanghai. One of them had his residence in Berlin. The latter's share of the goods claimed would therefore be liable to capture and confiscation as prize in any event, even if the partnership constituted a neutral house of trade. The former's share is also confiscable as belonging to an enemy, as he did not reside where it is suggested he might have acquired a commercial domicile. In any event, having regard to the extritorial conditions of European traders in Shanghai, I am of opinion that neither of the partners, British or German, did acquire, or could have acquired, a neutral commercial domicile in Shanghai in the circumstances of the present case.

I have already stated that the partnership, which was registered as a German firm under the extritorial privileges granted to Germany, cannot be said to be a neutral house of trade in Shanghai. I fail to see how the business can be regarded except as an enemy concern. It is, in my view, to be treated as an enemy house of trade, just as much as if the German authorities and community under and among which it was established were within a German colony or within the precincts of Germany itself.

This being so, I condemn the 57/100 shares of Goetz and Niclassen in the goods as enemy property to be forfeited to the Crown as droits of Admiralty.

Whether the 43/100 shares of H. E. Arnhold and C. H. Arnhold should be condemned depends upon whether they took proper steps in due time to dissociate themselves from the business. Unfortunately, the facts placed before the Court as to what part, if any, they took in the firm's business since the war were meagre, and the matter is left in doubt even upon their own shewing. The second affidavit of C. H. Arnhold states that he and his brother "in the month of May, 1915, both ceased to have anything to do with or to take any part in the

affairs of the business of Arnhold Karberg & Co. at Shanghai or elsewhere in China." It is explained that they started a business of their own in January, 1915, and that from January they only collected assets and paid the liabilities of the old firm's business. They appear to have been in some communication with the British Board of Trade. The period from August 4, 1914, to January, 1915, is not illuminated by any evidence.

The Procurator-General relied upon a letter of September 25, 1914, written in the name of the firm to Weis & Co. I ascertained that the letter was written by Goetz. I do not think that letter sufficient to shew that the British partners continued to take part in the business.

Mr. Bevan, for the claimants, said that he would tender Mr. C. H. Arnhold as a witness, but he was not called.

In this state of the evidence I do not propose to pass final judgment as to the shares of the British partners. If on further investigation by the Procurator-General he is satisfied that they did not continue to carry on the business in conjunction with their German partners after the war in such a way as to subject their shares to risk of confiscation, an application can be made to the Court to release the shares to them. If otherwise, then H. E. Arnhold and C. H. Arnhold must produce evidence before the Court within a reasonable time to explain what they did to break off their connection with the business after war began.

I accordingly give the Procurator-General and Messrs. H. E. and C. H. Arnhold liberty to apply as to the separate shares of the latter.

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*Solicitors*—Treasury Solicitor, for Procurator-General; Coward & Hawksley, Sons & Chance, for Arnhold Karberg & Co.; Gilbert Samuel & Co., for Kobe branch of Japan Export Co., and Hong-Kong and Shanghai Banking Corporation; Paines, Blyth & Huxtable, for International Bank Corporation of New York.

[Reported by E. C. Trehern, Esq., Barrister-at-Law.]

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## [ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT). Nov. 22, 1915.

## THE ST. HELENA.

*Cargo — Seizure as Prize — Release — Freight — Action for Freight in King's Bench Division—Subsequent Motion in Prize Court—Jurisdiction—Effect—Plea of Res Judicata—Estoppel.*

A cargo of cotton, wheat, and phosphate rock, laden in a British vessel and consigned to Hamburg, was seized as prize. Before the condemnation suit in prize was tried the Procurator-General ascertained that the phosphate rock, which had been discharged and warehoused at Runcorn, was owned by the consignors, a neutral company, and this portion of the cargo was released. Under the charterparty the shipowners had a lien for freight, and to get possession of their phosphate the cargo owners, under protest, deposited 1,680*l.* with the wharfingers in accordance with the provisions of the Merchant Shipping Act, 1894.

The shipowners brought an action in the King's Bench Division, claiming a declaration that they were entitled to the 1,680*l.* or to a sum pro rata itineris. ROWLATT, J., held that, the voyage not having been completed, the shipowners were not entitled to full freight, and that, there being no agreement to accept delivery of the phosphate rock at Runcorn in discharge of the obligation to deliver at Hamburg, they were not entitled to freight pro rata itineris (*Law Journal*, vol. 50, p. 241).

Thereupon the shipowners moved in the Prize Court for a declaration that they were entitled to a sum in lieu of freight to be assessed by the Registrar. The cargo owners contended that the matter was *res judicata*.

Held, that, as the claim arose out of a seizure in prize, the rights of the claimants must be determined in accordance with the principles of prize; that the matter was not *res judicata*, as the action in the King's Bench Division was upon a contract, and was decided according to common law principles, and not according to the equitable principles by which, in the Prize

*Court, a sum in lieu of the full freight can be given; and that the shipowners were entitled to an order for a reference to the Registrar to assess the amount, if any, which should be allowed them in respect of freight for the carriage of the cargo to Runcorn.*

Motion for payment of freight.

This was a motion on behalf of the St. Enoch Shipping Co., Lim., the owners of the steamship *St. Helena*, that it should be pronounced that they were entitled to be paid a sum in respect of freight by the Phosphate Mining Co., of New York, and that the amount thereof should be referred to the Registrar and Merchants.

The facts shortly were as follows:

By a bill of lading dated July 3, 1914, the Phosphate Mining Co. (hereinafter called the cargo owners) shipped at Tampa, Florida, in the *St. Helena*, a British ship owned by the St. Enoch Shipping Co., 2,550 tons of phosphate rock to be delivered at Hamburg to the order of the cargo owners or their assigns, they paying freight at the rate therein named. The bill of lading was subject to certain exemptions from liability, including arrests and restraints of princes, rulers, and people, and other conditions as per charterparty dated November 11, 1913. By the charterparty the shipowners were entitled to a lien on the cargo for all freight.

On August 3, 1914, the *St. Helena* arrived off the Lizard, and there she was advised by the Admiralty to discharge her cargo (of which the phosphate rock formed only a part) at some port in the United Kingdom. On August 4 war broke out between Great Britain and Germany, and it thereupon became impossible and illegal for the vessel to proceed to Hamburg. On August 7 the master of the ship was ordered by the owners to proceed to Manchester, which he did. On August 12 the cargo was arrested by the Admiralty Marshal as prize, and the ship was ordered to Runcorn, where the cargo was discharged. Before the condemnation suit in prize was heard the Procurator-General released the phosphate rock, which was deposited with the Manchester Ship Canal Co., subject to the shipowners' lien for freight. On December 16, 1914, the cargo owners deposited, under protest, 1,680*l.* for

freight in accordance with the Merchant Shipping Act, 1894, and took the phosphate rock away.

Thereupon the shipowners brought an action—*ST. ENOCH SHIPPING Co. v. PHOSPHATE MINING Co.* [1915] (*Law Journal*, vol. 50, p. 241)—in the King's Bench Division before Rowlatt, J., claiming a declaration that they were entitled to the 1,680*l.*, an order for payment thereof, or of such sum as might be due to them *pro rata itineris*. It was contended on their behalf that, as the delivery at Hamburg was prevented by the act of the law, they were entitled to the full freight or, if not, inasmuch as the cargo owners had received the phosphate at Runcorn, to freight *pro rata itineris*.

Rowlatt, J., held that the voyage, not having been completed, the shipowners were not entitled to full freight, and that, there being no agreement to accept delivery of the phosphate at Runcorn in discharge of the obligation to deliver it at Hamburg, they were not entitled to freight *pro rata itineris*.

The shipowners gave notice of appeal.<sup>1</sup>

On September 30 the shipowners served the cargo owners with the notice of the present motion in the Prize Court.

*Inskip, K.C.*, and *W. N. Raeburn*, for the shipowners.—The claim arises out of a seizure as prize, and is within the exclusive jurisdiction of the Prize Court—*THE CORSICAN PRINCE* (*ante*, p. 178); see also *THE IOLO* (*ante*, p. 291) and *THE JUNO* (*ante*, p. 151). The King's Bench Division had no jurisdiction to apply the equitable principles of the Prize Court, and the fact that a claim was made at common law under a mistaken assumption does not estop the shipowners from coming to the Prize Court to have the matter dealt with according to prize law. The claims are entirely different. The action in the King's Bench Division was on the contract of carriage, and was concerned with municipal law only. The matter, therefore, is not *res judicata*—*HUNTER v. STEWART* [1861] (31 L. J. Ch. 346) and *THE DUCHESS OF KINGSTON'S CASE* [1776] (20 St. Tr. 355; 1 Leach C.C. 146)—and the claimants are entitled to a sum in respect of freight to be assessed in accordance with the principles laid down in *THE JUNO* (*ante*, p. 151).

(1) On December 15, by motion in the Court of Appeal, the shipowners withdrew their appeal.—ED.



*Roche, K.C.*, and *R. A. Wright*, for the cargo owners.—The claimants deliberately sought the jurisdiction of the King's Bench Division, and *Rowlatt, J.*, decided on the money claim, which is identical with that now put forward. Therefore the claimants are estopped from bringing a second claim in respect of the same matter—see *SHOE MACHINERY Co. v. CUTLAN* [1896] (65 L. J. Ch. 44, 314; [1896] 1 Ch. 667) and *KNIGHT v. SIMMONDS* [1896] (65 L. J. Ch. 583; [1896] 2 Ch. 294)—or from contending that a Court of King's Bench is not a competent tribunal to adjudicate upon the claim. *Rowlatt, J.*, held that the seizure as prize was immaterial to the question of freight; and the distinction between this case and *THE CORSICAN PRINCE* (*ante*, p. 178) is that in the latter case the Prize Court was dealing with the consequences of capture, and not merely with events which might happen. The facts in the present case are entirely different from those in *THE IOLO* (*ante*, p. 291), where the Procurator-General had given an undertaking that the release was subject to payment of freight.

*Theobald Mathew*, for the Procurator-General, took no part in the arguments.

SIR SAMUEL EVANS (THE PRESIDENT).—I should have liked to have the assistance of the Court of Appeal if that could have been afforded to me; but the claimants here, the owners of the ship, are entitled to my decision upon the claim which they bring forward, and I must give it.

They claim certain moneys in lieu of freight for carrying the cargo, which consisted of phosphate rock, from the port of loading until the ship was diverted and the cargo was discharged elsewhere. It appears that there was a cargo of cotton and a cargo of wheat on board, in respect of which there was a judgment for their condemnation as prize. There was a seizure also of the cargo of phosphate, with which we are now dealing. But further investigations were made by the Procurator-General, and after an interval of time this cargo was released to the owners, the Phosphate Mining Co., subject to any questions which might arise between them and the shipowners.

The question now before me is whether or not the claimants are entitled to have an enquiry made into the question whether

some sum, and, if so, what sum, ought to be allowed to them in respect of freight for the carriage of this cargo so far as they carried it. The preliminary objection which has been taken is that the claimants have already chosen another tribunal, to which they resorted—namely, one of the Judges of the King's Bench Division.

An action was brought in the King's Bench Division which came to trial before Mr. Justice Rowlatt, and that action is now on its way to the Court of Appeal, and will be dealt with there unless the appeal be abandoned.<sup>1</sup> Mr. Justice Rowlatt, it is said, decided the very question which I am asked to decide here, and the contention, therefore, is that this matter is *res judicata* and that this Court has no right to deal with it.

I do not think that Mr. Justice Rowlatt did decide the question which I am called upon to decide. The case before Mr. Justice Rowlatt was a case of an action upon a contract for a certain sum for freight—the named sum according to the bill of lading, or for a sum which was to be ascertained *pro rata itineris*, as it was described in one part of the judgment, as upon a *quantum meruit*. I do not find that any application was made to the learned Judge to proceed upon principles which are applicable to cases of this description in the Court of Prize. The plaintiffs did not appear before him and say, “We are not entitled according to the common law—according to the municipal law—to anything at all, but we hope that you will apply the equitable principles which have been applied in the Prize Court and give us some sum in lieu of the full freight.” That application was never made, and the learned Judge never decided upon any such claim as that. Upon the claim which was made before him—a claim under the municipal law—he decided and pronounced judgment.

The claimants now come here and say that there was no jurisdiction in the King's Bench Division which would entitle the learned Judge to deal with the matter upon the footing on which it ought to be dealt with in this Court. Therefore they say, “So far as our present claim is concerned, we did not make it in the Court of King's Bench, and we could not do so because it had no jurisdiction to deal with such a matter.” In this Court I have jurisdiction to deal with it if it is a

matter arising out of a seizure as prize, and I think it is perfectly clear, according to the evidence, not only that there was a seizure as prize of this cargo, but that such rights as the claimants have for the carriage of the cargo must be determined in accordance with the principles in prize. The freight, or sum in lieu of freight, to which they may be entitled will depend upon certain matters which have arisen as the consequences of the seizure as prize by the Procurator-General.

I have gone fully into the decisions of my predecessors in the Prize Court, and into the decisions relating to similar questions in cases before the Court of King's Bench in the old days, and I have set out my conclusions in the case of *THE CORSICAN PRINCE* (*ante*, p. 178). It is quite unnecessary for me to repeat anything that I there said. I think that this claim is within the decision in *THE CORSICAN PRINCE* (*ante*, p. 178). The facts relating to the two cases are different, but I think that the principles to be applied are the same, and that the claimants are entitled to an order from me that the matter be referred to the Registrar to decide what sum should be allotted to them, if any, in respect of freight for the carriage of this cargo.

*Leave to admit an appeal. Security 200l.*

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*Solicitors*—Lowless & Co. ; W. A. Crump & Son ; Treasury Solicitor.

[*Reported by E. C. Trehern, Esq., Barrister-at-Law.*]

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[ADMIRALTY. IN PRIZE.]

SIR SAMUEL EVANS (THE PRESIDENT).

Nov. 15, 18, 29, 1915.

THE KRONPRINZESSIN CECILIE.

*Cargo—Passing of Property—Bills of Lading Indorsed to “Selling agents”—Payment of Drafts Refused—Intention to Pass Property—Effect.*

*Under an arrangement entered into between a number of lead-producing companies, before the outbreak of war an*

*American corporation shipped a quantity of lead under bills of lading which were indorsed to a German metal company at Frankfort, described as "selling agents." By the terms of business between the parties the corporation did not reserve any right of disposal of the goods after shipment. The bills of lading and an invoice were forwarded to the German company, and the shippers drew on a British company, who were parties to the arrangement, for the provisional price, which was not the exact price at which the goods were sold by the selling agents, less commission, but a price fixed by computation of sales supplied by other producers. On August 5, 1914, the lead was seized as prize, and on August 8 the British company, owing to the outbreak of war, refused to honour the draft. The American corporation claimed that the property in the goods still remained in them:—Held, that, even if the German company were merely selling agents, the property in the goods could still pass to them from the American principals; that the question whether the property had passed depended on the intention of the parties, and was a question of fact; and that on the facts the property had passed, and was therefore enemy property at the time of seizure.*

Action for a declaration as to the ownership of cargo.

On August 5, 1914, the steamship *Kronprinzessin Cecilie*, belonging to the Hamburg-Amerika Line, was seized as prize, together with her cargo, at Falmouth. Part of the cargo consisted of 350 tons of pig lead, and in the present action the Crown asked for a declaration as to its ownership, as, assuming it to be enemy property, it would follow the result of the trial of the action against the ship. In that action, which had not yet been tried, the shipowners were claiming to be entitled to the benefit of the Sixth Hague Convention.

The lead was claimed by the consignors and shippers, the American Smelting and Refining Co. The case for the Crown was that the property in the lead had passed to the Metallgesellschaft, of Frankfort.

The facts and arguments are stated in the judgment.

*Dawson Miller, K.C.*, and *R. A. Wright*, for the Procurator-General.

*Leslie Scott, K.C.*, and *C. R. Dunlop*, for the claimants.

*Leck, K.C.*, and *D. Stephens* watched the case for *H. R. Merton & Co., Lim.*

[In the course of the arguments *IRELAND v. LIVINGSTON* [1872] (41 L. J. Q.B. 201; L. R. 5 H.L. 395), *WAIT v. BAKER* [1848] (17 L. J. Ex. 307; 2 Ex. 1), and *Benjamin on Sale* (5th ed.), pp. 394-5, were referred to.]

*Cur. adv. vult.*

*Nov. 29.*—*SIR SAMUEL EVANS* (THE PRESIDENT).—The subject-matter of the dispute in these proceedings is a consignment of 350 tons of pig lead laden in the steamship *Kronprinzessin Cecilie*, of the Hamburg-Amerika Line, bound from New York to Hamburg.

The consignors were the American Smelting and Refining Co., a corporation of the State of New Jersey, United States of America, who are the claimants. The consignment was shipped under bills of lading to the order of the shippers at Hamburg. The bills of lading were indorsed by the American Smelting and Refining Co. to the "Metallgesellschaft, or order," and were sent forward to the Metallgesellschaft at their head office at Frankfort. The shipment took place at the end of July, 1914, and the goods were seized at Falmouth on August 5, 1914.

The question which falls to be decided is whether at the date of seizure the goods were the property of the American Smelting and Refining Co. or of the Metallgesellschaft; or, in other words, whether they were the property of neutral citizens or of enemy subjects.

The Metallgesellschaft is a German company, well known as one of the largest metal merchants or dealers in the world before the present war. The claimants' contention is that this enemy company acted merely as selling agents for them in this transaction, and that they had no property in the goods. The business connection between the American and the German companies requires to be stated.

In 1909 an arrangement, briefly described as the "Pig Lead Convention," was made between certain lead-producing concerns of Spain, France, the United States of America, Belgium, and Germany. It dealt with the sale in Europe of lead produced in the various countries named. It was what is sometimes called

a "syndicate" or "combine." Six separate concerns in the producing countries, and three others represented by the Metallgesellschaft, of Frankfort, entered into the arrangement and were described as the "producers"; and the Metallgesellschaft, of Germany, and Messrs. Henry R. Merton & Co., Lim., of London, were described as "selling agents."

It was governed by an agreement dated March 19, 1909. This was produced, and can be referred to for its terms. Among the "producers" were the American Smelting and Refining Co., of New York, the present claimants. Later on—in 1913—the claimants withdrew from the Convention, "in view of certain legislation by the Congress of the United States, and of the attitude of public officials of the United States towards commercial dealings of a certain type."

Their withdrawal, however, was more illusory than real, for they at once, according to their own shewing, entered into an arrangement with the Metallgesellschaft, which secured for them the substantial benefits of the old agreement, with what they appeared to deem an immunity from the possible results of the anticipated "legislation by the Congress of the United States," and "the attitude of the public officials of the United States toward commercial dealings of a certain type."

The proof of this is that in the present proceedings the claimants harked back to the agreement of 1909 in order to found and support their claim. The new agreement was the result of a correspondence between May 29, 1913, and August 21, 1913. Loth as I am to burden this judgment by setting out letters, I think it more satisfactory that the correspondence should be made to appear and speak for itself. It was as follows:

"From the American Smelting and Refining Company, 165, Broadway, New York. New York, May 29, 1913. To Messrs. Metallgesellschaft, Frankfort, Germany. Gentlemen,—As we explained to your Mr. Richard Merton, Jr., when he was in New York, we have for some time felt that, for reasons explained to Mr. Merton, it would be advisable for our company to withdraw from the Pig Lead Convention, of which we have been a member for the past three years. The present agreement expires December 31, provided notice is given of withdrawal or cancellation previous to June 30 of this year. We desire,

therefore, to give the necessary notice of withdrawal, and will request that you present the same to the other members of the Convention by correspondence or in the meeting called for June 25.

"The situation is such that we would feel greatly obliged if, by unanimous consent, we could be released from our agreement with the other members of the Lead Convention as of June 30. May we ask, also, that you present this request.

"Provided, and when, this release takes place, we desire to appoint your company and Messrs. Henry R. Merton & Co., Lim., as the agents for the sale of all pig lead which we shall desire to sell on the Continent of Europe and in Great Britain for a period of one year, the arrangement to be renewed year by year on six months' notice.

"We will notify you in due course of the amount of lead which we desire you to sell for our account, leaving the distribution as to destination to your own best judgment, having in view always the most economical ports for the delivery of the lead, and we require that we should be paid for our lead the same price month by month as you obtain for such lead as you may sell at similar times, and for similar deliveries for account of others or for account of your company. In due course kindly let us know whether this arrangement will be satisfactory to you, and if so proper contracts can be drafted. If you prefer, the contract may be drafted by your own attorneys and sent here for our approval, or we will make a draft and execute the same, sending it over for your approval. Awaiting your further advices, we beg to remain respectfully, yours (Signed) Edward Brush."

"From the American Metal Company, Ltd., 52, Broadway, New York. June 26, 1913. To Mr. Edward Brush, Vice-President American Smelting and Refining Co., New York City. Dear Sir,—We are just in receipt of a cable from our Frankfort friends reading as follows: 'Lead Convention has been renewed up to December 31, 1914. We have arranged American Smelting and Refining Company as per their letter May 29 Declaration do not share opinion of the American Smelting and Refining Company. Have written fully upon the subject. It is quite out of the question for us to sell for their account outside of the Convention. Were compelled to advise

Convention of four hundred tons sold in London, but we, Merton and American Metal Company, do not participate.

“‘So as to satisfy our friends, have arranged subsequent declaration of two thousand tons May, but this is not to be considered a precedent. So as to assist, we are prepared to cede to the American Smelting and Refining Company besides two thousand tons of our May declaration.’ I have been trying to consult with you over the ‘phone with regard to this cable, but as I have not succeeded, would suggest that you let me know when it will be convenient for you to discuss the same with me. Yours very truly, (Signed) C. M. Loeb.”

“From the American Smelting and Refining Company, 165, Broadway, New York. New York, July 11, 1913. To Messrs. Metallgesellschaft and Henry R. Merton and Co., Ltd. Gentlemen,—We have received notice to the effect that the Lead Convention which has sold our lead and that of other producers jointly for the past three or four years, had, at our request, relieved us from membership in this Convention as of June 30, 1913.

“This request was made by us not on account of any dissatisfaction with the outcome of the sales made by you as sales agents of the Lead Convention but on account of local and personal reasons. We desire, therefore, to enter into an arrangement with you, beginning with July 1, whereby you will act as sales agents for this company in the selling of all pig lead which we may have for sale on the Continent of Europe or in Great Britain during the balance of this year and the year 1914. We will pay you the same commissions that have been paid by us in the past. We will notify you the first of each month how much we desire to have you sell for shipment during the following month and will estimate as closely as we can how much we expect to have for sale, which shall be shipped during the second succeeding month. We will be willing to accept from you a proportion of your total sales for shipment in each month equal to the proportion existing between the lead which we give you for shipment in each month and the total amount which is shipped for all of your customers in each month. The price paid to us shall be the same as that paid by you to your other customers for similar shipment and similar delivery.



"We shall expect you to keep us informed monthly with reference to the condition of the market, the condition of your sales, the condition as to unsold lead given you for sale, and full information as to deliveries and prices obtained in order that we may have before us statistics that will be sufficient to indicate to us that we have received both proper proportionate sales, shipping orders and prices.

"This arrangement will be continued by us for periods of 12 months succeeding the year 1914, unless notification of our desire to withdraw from this arrangement is given to you previous to July 1 of the preceding year. In other words, if we should not give you notification of withdrawal previous to July 1, 1914, this arrangement will continue during the year 1915 and so on. We trust that this arrangement may prove mutually satisfactory.—Very truly yours, (Signed) Edward Brush."

"From Metallgesellschaft, Frankfort, August 21, 1913. To Edward Brush, Esq., Vice-President and assistant to the President, American Smelting and Refining Company, New York. Dear Sir,—We are pleased to inform you that we have had an opportunity to discuss your favour of July 11 with Mr. Loeb, and we agree to the arrangement as set forth therein. We have asked the American Metal Company to explain to you how we understand the working of the agreement.

"Mr. Loeb tells us that he had explained to you how the declarations have been made hitherto by a number of the producers, and you will therefore understand that we cannot bring about the change you desire from one day to the next. However, we understand from Mr. Loeb that as long as we are arranging to fall in with your conditions you will give us such time as we require to comply with the same. We beg to assure you that this will be done as quickly as circumstances will permit.

"You will have seen from the recent declarations that a number of the smelters have refrained from making the declarations for August and September in order to achieve the aforesaid aim, and we hope that within a few months the declarations for the respective months will be in absolute consonance with the quantities available for such months.

"In the meantime the accounting will, of course, take place

as heretofore. There may be slight variations in the matter of shipments, which, however, in the circumstances cannot be avoided, due to the differences in time consumed in transit on account of the geographical location of the various smelters, and furthermore, our aim being to distribute the very large quantities in a way most profitable to the syndicate.

“In conclusion, we desire to assure you that we are in full sympathy with your attitude, and that we will arrange as quickly as possible to your entire satisfaction.—Yours faithfully, Metallgesellschaft. Henry R. Merton & Co., Ltd.”

It is necessary now to state the facts with regard to the particular consignments with which the Court has to deal.

Instructions for the shipment of the goods were sent by the Metallgesellschaft to the American claimants on June 21, 1914, for shipment in July to order c.i.f. Hamburg. Towards the end of July the goods were shipped by the American Smelting and Refining Co. on the *Kronprinzessin Cecilie*. On July 27 an invoice was sent to the Metallgesellschaft for the goods at a provisional price of 6,241*l.* 3*s.* 3*d.* (in terms of the arrangement), with a statement that the American Smelting and Refining Co. had drawn on Messrs. Henry R. Merton & Co., Lim., for the amount.

The bills of lading, together with the insurance certificates, were also sent to the Metallgesellschaft indorsed to their order. On the same day the American Smelting and Refining Co., through their bankers, sent to Messrs. Henry R. Merton & Co., Lim., a copy of the invoice with a draft on demand for the amount, included with other amounts for shipments made to Messrs. Henry R. Merton & Co., Lim., direct. Messrs. Henry R. Merton & Co., Lim., refused to pay the 6,241*l.* 3*s.* 3*d.* on presentation of the draft on or about August 8—a date subsequent to the seizure.

The first statement of the claim of the American Smelting and Refining Co. was made upon oath by its vice-president, Mr. Edward Brush, in New York, on August 25, 1914, and was forwarded in due course by the American Smelting and Refining Co.'s solicitors to the Procurator-General.

It is important, in view of the contentions made at the trial, to note its contents. The ground put forward was that the goods, although “sold” to the Metallgesellschaft, remained the

property of the American Smelting and Refining Co., because the draft on Messrs. Henry R. Merton & Co., Lim., for the price had not been paid. The transaction between the American Smelting and Refining Co. and the Metallgesellschaft, and two similar transactions with Messrs. Henry R. Merton & Co., Lim. (both now alleged to be mere agents), were therein described as sales. The term "sale" was repeated half a dozen times in the sworn statement. This term was afterwards said to have been used in error.

It was also deposed that the bills of lading, with invoices and other documents, were attached to the draft and sent to Messrs. Henry R. Merton & Co., Lim. This was not the fact. They had been sent direct to the Metallgesellschaft with an indorsement in their favour. The deposition further stated as follows:

"The draft was duly presented to Messrs. Henry R. Merton & Co., Lim., who advised the American Smelting and Refining Co. that, with its approval, it would pay for the two lots of lead shipped to Liverpool and Bristol (for Messrs. Henry R. Merton & Co., Lim.), but that, due to the war, they could not and would not pay for the lead 'sold' to the Metallgesellschaft, of Frankfort. The American Smelting and Refining Co. assented to this."

The documents whereby Messrs. Henry R. Merton & Co., Lim., so advised, and the American Smelting and Refining Co. so assented, were not produced.

I will pass by the first formal claim of September 19, 1914, and the second claim of November, 1914. In the latter the explanation of sending the bills of lading and other shipping documents to the Metallgesellschaft, and the draft to Messrs. Henry R. Merton & Co., Lim., was given as follows:

"By arrangement between the claimant company, the Metallgesellschaft, of Frankfort, and Messrs. Henry R. Merton & Co., Ltd., an exceptional mode of dealing has been followed in the case of shipment of lead by the claimant company consigned to the Metallgesellschaft, of Frankfort, whereby Messrs. Henry R. Merton & Co., Ltd., regularly honoured drafts drawn by the claimant company covering such shipments, without presentation of the bills of lading, and whereby such documents

of title were forwarded direct to the Metallgesellschaft, of Frankfurt."

No documents evidencing this arrangement were produced, so that it is not possible to determine its exact legal effect. The inference legitimately to be drawn from the statement, however, is that the claimants were content to send the documents of title to the German company, and to look only to the English company for payment. I see no reason to suppose that the arrangement did not constitute a tripartite agreement, under which the American Smelting and Refining Co. would be entitled to bring an action against Messrs. Henry R. Merton & Co., Lim., for not honouring the draft for the value of the goods consigned by bills of lading to the Metallgesellschaft. The statement already referred to, that the American Smelting and Refining Co. approved of, and consented to, the proposal of Messrs. Henry R. Merton & Co., Lim., not to pay the Metallgesellschaft's proportion of the draft, is consistent with such an agreement.

The course of dealing, which involved transactions with the other "producers" named in the 1909 agreement, as well as with the claimants, was complicated.

In order to avoid stating burdensome details I will summarise the elements which appear to bear upon the question in discussion—namely, whether the transactions were sales to the German company or not. Some time beforehand the various producers had to inform the Metallgesellschaft of the quantities they estimated to produce and to supply in a particular month. The sales for that particular month were then allocated by the Metallgesellschaft between the producers in agreed proportions. Shipping instructions were then sent by the Metallgesellschaft to the claimant company. They shipped goods accordingly.

The invoices sent by the shippers were provisional, and were made out at certain regulated prices. The bills of lading, invoices, and shipping documents were sent indorsed to the Metallgesellschaft. Copies of the invoices, with drafts on demand, were sent to Messrs. Henry R. Merton & Co., Lim., for the amount provisionally fixed. After the shipment the claimant company had nothing to do with the goods. They did not know what the Metallgesellschaft did with them. They never knew a single purchaser who bought the goods. To use

the words of Mr. Brush, the official of the claimants: "Through none of the statements furnished by the Metallgesellschaft or otherwise is the claimant company ever advised as to the identity of individual purchasers from the Metallgesellschaft, or as to the localities in Germany or elsewhere to which the lead is shipped after sale; that any consignment by the American Smelting and Refining Co. to Hamburg, as, for example, the consignment on the *Kronprinzessin Cecilie*, may have been intended for transshipment and forwarding to purchasers in Russia or Scandinavia."

The price to be paid to the claimants for the goods again appears to be important. If the Metallgesellschaft were mere agents, it would follow that they would have to account to their principals for the exact sum for which the goods were sold, less, of course, their commission or other proper deductions. But the sum accounted for was not, in fact, that for which the goods had been sold, but a sum which was fixed by computation of sales of pig lead supplied by other producers (including the Metallgesellschaft themselves) and at other times. The description of the price payable in the letter of July 11, 1913, is as follows: "The price paid to us shall be the same as that paid by you to your other customers for similar shipment and similar delivery."

That may or may not be a precise description of what was done in the course of dealing, but it shews clearly that the Metallgesellschaft were not accountable to the American Smelting and Refining Co. as principals for the sums actually received by them as agents from the purchasers to whom they sold the goods. The "price to be paid" are words apt to denote a sale, and not an accountability by agents for "sums received." One sum might be greater or less than the other.

Certain accounts were produced relating to declarations in February, 1914, and sales in April. The sales were accounted for by applying prices obtained for goods of a dozen companies sold at some time which has not been proved. An example of the working out of the system may be extracted from these accounts. The whole declarations made in February for sale on the Continent were 20,210 tons. Of this total a quantity of 2,176 tons was allotted to the claimant company. Instructions were given for shipment in April. Shipments amounting to

2,176 tons were accordingly made by the claimant company between April 6 and 17.

The price credited by the Metallgesellschaft to the American Smelting and Refining Co. was at 18*l.* 5*s.* 7*d.* per ton. No information was given as to any price of, or any sum realised by, the claimants' own goods. The 18*l.* 5*s.* 7*d.* was an average price allowed for the 20,210 tons declared in February and sold, according to counsel for the claimants, at some other time.

I have taken two prices at which different lots were sold according to Exhibit F1, one low and one high—17*l.* 9*s.* 4*d.* and 19*l.* 7*s.* 7*d.* If the claimants' pig lead had been sold at either of these prices in April, they were credited by the Metallgesellschaft with 1,768*l.* more than the goods would have realised in the one case, and 2,393*l.* 12*s.* less in the other case. The above appears to me to be consistent only with a sale of the goods by the claimant company to the German company.

It was contended that the circumstance that the Metallgesellschaft were described as selling agents, and were paid by a commission, was to a great extent, if not absolutely, decisive of the question. That contention, in my opinion, is unsound. The commission they received—be it remembered not upon the sum realised for the claimants' goods, but upon all the lead they sold in Europe in a previous certain time—was a means of ascertaining the profit they were content to have upon the lead they distributed, with the additional great advantage accruing to them of obtaining the control of the market in that metal.

In my opinion it was never intended by the claimants to reserve any right of disposal over the goods after they were shipped to the Metallgesellschaft under bills of lading indorsed to them. On the contrary, the whole control over and property in the goods were intended thereupon to pass to the German company. It would not be extravagant to surmise that none would be more surprised than the Metallgesellschaft to hear it suggested that the goods were not their property—not even the claimant company itself.

But let it be assumed for the sake of argument that the result of the arrangement and course of dealing was that the indorsees of the bills of lading were only commission agents

or merchants. Even so the property might still pass to them from the foreign principal—*vide* the opinion of Mr. Justice Blackburn in answer to the question of the House of Lords in *IRELAND v. LIVINGSTON* (L. R. 5 H.L. 395, at pp. 406-409), the comment upon it by Lord Esher in *CASSABOGLU v. GIBB* [1883] (11 Q.B. D. 797, at pp. 803, 804), and *Story's Commentaries on the Law of Agency* (9th ed.), ss. 33, 34, 110-112.

In either case the question of whether the property passed depends upon intention, and is a question of fact.

In my opinion, in any view of the case it is reasonably certain that both the claimant company and the Metallgesellschaft intended the property in the lead to pass, and regarded it as having passed to the latter company.

The decision of the Court is that at the time of the seizure of the lead at Falmouth it was the property of the enemy company.

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*Solicitors*—Treasury Solicitor; Burn & Berridge.

[*Reported by E. C. Trehern, Esq., Barrister-at-Law.*]

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[IN H.B.M. SUPREME COURT FOR EGYPT. IN PRIZE.]

(*Sitting at Alexandria.*)

GRAIN, J. July 22, 1915.

THE ACHAIA (No. 2).

*Cargo — Enemy Ship — Discharge in Port — Storage in Customs House Shed — Neutral Property when Landed — Seizure as Enemy Property in Port — Validity.*

*Part of the cargo of a captured enemy ship was discharged in an Egyptian port and stored at the Customs warehouse. At the time of discharge the cargo, which belonged to a Turkish railway company, was neutral property. After the outbreak of war between Great Britain and Turkey the cargo was seized as prize by the Marshal:—Held, that the seizure was lawful, and that the cargo was subject to confiscation.*

In this suit the Crown claimed condemnation of part of the cargo lately laden in the German steamship *Achaia*, which came into the port of Alexandria on July 31, 1914, and was seized as prize on October 17 and subsequently condemned (see *ante*, p. 242).

The goods in question, consisting of twenty-one locomotives, the property of a Turkish railway company, were discharged at Alexandria and stored at the Customs sheds within the limits of the port. After the outbreak of war between Great Britain and Turkey the goods were taken over by the Marshal as prize. Their release was claimed by the Turkish company on the ground that when landed the goods were neutral property.

*Arthur Preston (H.M. Procurator-General)*, for the Crown.

*C. M. Halford*, for the claimants.

*Cur. adv. vult.*

GRAIN, J.—I reserved judgment in this case because I thought that perhaps it might be distinguished from the case of *THE ROUMANIAN* (*ante*, p. 75), decided by the President of the Prize Court in London (Sir Samuel Evans); but on consideration of that case, and the cases quoted by Mr. Halford on behalf of the claimants, I am of opinion that the case now before me falls within the law laid down in *THE ROUMANIAN* (*ante*, p. 75).

The facts are as follows:

Twenty-one packages of locomotives were consigned by a German firm from Hamburg to the Chemins de Fer Ottomans de Jaffa on the s.s. *Achaia*, a German ship, which was captured as prize in August, 1914, and confiscated by this Court in February, 1915 (*ante*, p. 242). The cargo in question was discharged at Alexandria between August 9 and 13, and was stored in the Customs sheds, and was retained there under the control, and in the possession of, the Customs House officials until it was taken over by the Marshal of His Majesty's Prize Court in November, 1914, after the declaration of war between Great Britain and Turkey on November 5, 1914.

It is urged by counsel for the claimants that when these goods were landed they were the property of a neutral—namely, Turkey—and as neutral goods they passed into possession of



their neutral owners on being landed. Therefore, it is said, the Prize Court had no further rights or control over these goods.

In THE ROUMANIAN (*ante*, p. 75) the cargo consisted of oil, which had been run off the ship into tanks within the limits of the port. The oil could not be dealt with or removed until certain proceedings had been completed by the Customs officials. In this case the goods were placed in the Customs sheds, and also could not be removed or dealt with without the permission of the Customs officials, and the Customs sheds are within the limits of the port of Alexandria.

The only difference between the two cases is that in THE ROUMANIAN (*ante*, p. 75) the goods were enemy goods when landed, while in this case they were neutral goods, and did not become enemy goods until a later period.

In THE ROUMANIAN (*ante*, p. 75) the President (Sir Samuel Evans) states: "We start, accordingly, in considering the present case, with the broad proposition that all enemy property—ships and cargoes—may, after the outbreak of war, be captured *jure belli* on the sea or in rivers, ports, and harbours of this country" (*ante*, p. 84). And it was held in that case that, although the oil had been put into tanks within the limits of the port, it was, as regards the jurisdiction of the Prize Court, still part of the cargo of a ship liable to be seized as prize. Therefore it is permissible to hold that the goods in the case now before me were part of a cargo of a ship which has been properly seized and duly confiscated as good and lawful prize.

The question is, Does the fact that when the goods were landed they were neutral property make any difference?

The goods have been in the custody of officials of the port since the ship was seized. The property in the goods is either in the shippers, a German firm, or in the Turkish railway company. For the purposes of this argument it has been taken that they belong to the Turkish railway company.

Now, assuming for a moment that they had been allowed to remain in the confiscated enemy ship, could it then be contended that when war broke out with Turkey the Prize Court had no power to arrest these goods? On the authority of THE ROUMANIAN (*ante*, p. 75) these goods, although landed, are still part of the cargo of the enemy ship *Achaia*, and being

still within the jurisdiction of the Prize Court, and having become enemy property, I am of opinion that the Prize Court has power to confiscate these goods.

THE OOSTER EEMS [1784] (1 C. Rob. 284*n.*; 1 Eng. P.C. 136*n.*) and THE CHARLOTTE [1808] (6 C. Rob. 386*n.*; 1 Eng. P.C. 585*n.*) have been quoted on behalf of the claimants, but in THE OOSTER EEMS (1 C. Rob. 284*n.*; 1 Eng. P.C. 136*n.*) it was held that the goods had passed in the way of civil bailment on delivery into civil hands before they were arrested; and in THE CHARLOTTE (6 C. Rob. 386*n.*; 1 Eng. P.C. 585*n.*) it was held that the goods had been sold and delivered before they were liable to seizure.

Neither of these contentions can be maintained in this case.

I therefore hold that these locomotives were the property of the Chemins de Fer de Jaffa, a Turkish company, and were properly seized as prize, and make an order for confiscation and sale.

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[*Reported by Norman Bentwich, Esq., Barrister-at-Law.*]

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[IN H.B.M. SUPREME COURT FOR EGYPT. IN PRIZE.]

(*Sitting at Alexandria.*)

GRAIN, J. Sept. 6, 1915.

THE LUTZOW (No. 3).

*Cargo — Ownership — Enemy Consignors — Friendly Consignees — “Documents against acceptance” — Letter of Credit to Accept Drafts for Consignees — Effect.*

*Before the outbreak of war certain goods were consigned by German shippers to Japanese consignees, the contract providing for delivery of the documents against acceptance of the seller's draft. On account of the outbreak of war the drafts drawn on the consignee's British bankers were not accepted. The bankers held a letter of credit authorising them to accept drafts on behalf of the consignees generally:—Held, that the letter of credit did*

*not operate as an actual acceptance, and that the property in the goods had not passed to the consignees.*

In this suit the Crown asked for the condemnation of some cases of coatings, which were shipped in July, 1914, on board the German steamship *Lutzow* at Hamburg and consigned to Japan. On behalf of the Japanese claimants it was contended that the property in the goods had passed to the consignees. The facts and arguments appear from the judgment.

*Arthur Preston (H.M. Procurator-General), for the Crown.*  
*G. A. W. Booth, for the claimants.*

GRAIN, J.—The goods in this matter, cases of coatings, were sold and shipped by Heisch Heinrichsen & Co., a German firm at Hamburg, and were consigned and invoiced to Messrs. Tomisai & Co. in Japan. The contract is one of “documents against acceptance,” and the drafts drawn by the shippers on the consignees through Lloyds Bank, in consequence of the outbreak of war, have not been accepted. So far there is no difficulty about the matter. The drafts not having been accepted, the property in the goods has not passed, and remains in the German firm at Hamburg.

But Mr. Booth, who appears for the Sumitomo Bank of Japan and the consignees, Messrs. Tomisai & Co., urges that there is another element in this case to be considered—namely, that the Sumitomo Bank have given Lloyds Bank a letter of credit to accept drafts on behalf of the consignees; that, in consequence of this letter of credit, whenever a draft arrives it will be, and is bound to be, accepted as a matter of course. And Mr. Booth therefore argues that, the letter of credit being in existence, the drafts are really accepted as soon as they are drawn and forwarded, and that it must be assumed in this case that the drafts have been accepted and the property passed to Messrs. Tomisai & Co., of Japan.

But, in my opinion, this is assuming too much from a letter of credit. Many things might happen to prevent the drafts being accepted, notwithstanding the letter of credit, such as the bank holding the letter of credit going bankrupt and being closed down, and, as is the case here, the outbreak of war.

A letter of credit is merely a request by one party to another to advance money or give credit to a third party or accept bills drawn upon himself. And the person to whom the letter of credit is addressed is merely in the same position, and in no better position, than the person on whose behalf the letter is given. It only gives him authority to accept drafts when they come before him. In this case the cargo is shipped under special conditions—namely, documents against acceptance—and until the drafts are actually accepted no property passes. And although in this case, had it not been for the war, the drafts were certain to have been accepted by reason of the letter of credit, nevertheless no actual acceptance has taken place.

I therefore hold that the property in these goods remains in the consignors, the German firm at Hamburg, Heisch Heinrichsen & Co., and are consequently enemy goods, and the order of the Court will be confiscation and sale.

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[*Reported by Norman Bentwich, Esq., Barrister-at-Law.*

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[IN H.B.M. SUPREME COURT FOR EGYPT. IN PRIZE.]

(*Sitting at Alexandria.*)

GRAIN, J. Sept. 6, 1915.

THE KOERBER (No. 2).

*Cargo — Ownership — Passing of Property — “Documents against acceptance” — Enemy Consignee — Qualified Acceptance by British Firm after Outbreak of War — Trading with the Enemy — Effect.*

*Before the outbreak of war certain goods were shipped by a British firm to enemy consignees, the terms of the contract providing for delivery of the documents against acceptance of the seller's draft. After the outbreak of war the draft was accepted by an English firm “to protect the interests of the shipment”:—Held, that the acceptance was not on behalf of the consignees, and did not amount to trading with the enemy, nor*

*was it sufficient to pass the property in the goods, which, therefore, remained vested in the consignors.*

Suit for condemnation of cargo.

This was a suit for the condemnation of seventy-two chests of tea, which were shipped by British merchants at Foochow on board the Austrian steamship *Koerber*, and consigned to Austrian merchants in Vienna and Trieste. The goods were claimed by a firm of British bankers, who, after the outbreak of war, had accepted drafts drawn on them by the shippers to protect the interests of the shipment. The facts are stated in the judgment.

*Arthur Preston (H.M. Procurator-General), for the Crown.*

*C. M. Halford, for the claimants.*

GRAIN, J.—The goods in this case, consisting of seventy-two chests of tea, were shipped by Messrs. Westphal, King & Ramsay, Lim., on July 17, 1914, at Foochow, on board the s.s. *Koerber*, an Austrian ship, already dealt with by this Court.

The consignees were Austrian subjects in Vienna and Trieste, and the contract was one of “documents against acceptance.”

Westphal, King & Ramsay, Lim., through the Bank of Taiwan, Lim., drew bills on Messrs. Brandt & Co., bankers and merchants, of London, an admittedly British firm. Messrs. Brandt & Co. accepted the drafts on August 24, 1914, after the outbreak of war. An affidavit put in by one of the directors of Messrs. Westphal, King & Ramsay, Lim., states “that owing to a Proclamation issued at the commencement of August, 1914, it was impossible for Messrs. Brandt & Co. to accept this draft and enter into liability on an account of an alien enemy, and I am informed that they accepted the said draft to protect the interests of the shipment, with the intention of retaining the goods themselves to meet the draft.” And in a letter put in from Messrs. Brandt & Co. they say: “It was impossible for us to accept on the aforementioned date a draft for account of an enemy interest. We accepted the draft solely on our own account.”

On these grounds Mr. Halford, who appears for Brandt & Co., claims a release for the firm. The Procurator opposes

it, and asks that the goods shall be confiscated on the ground that Brandt & Co. had no power to accept on their own behalf, and that in reality they accepted on behalf of the alien enemy, and in so doing were trading with the enemy, and that therefore the goods should be confiscated. He cites *KERSHAW v. KELSEY* [1868] (*Scott's Cases on Int. Law*, 535; 100 Massachusetts, 561), *SMALL v. LUMPKIN* [1877] (*Scott's Cases on Int. Law*, 538; 28 Grattan, 832), *THE RAPID* [1814] (*Scott's Cases on Int. Law*, 557; 8 Cranch, 156), *AMORY v. MCGREGOR* [1818] (*Scott's Cases on Int. Law*, 561; 15 Johnson's Rep. 24), and *THE SOUTHFIELD* (*ante*, p. 332), lately decided by the Prize Court in London.

In the first place I am of opinion that Messrs. Brandt & Co. had no power to accept on their own behalf, as there was no contract or contemplated contract as regards the vesting the property of the goods between them and Messrs. Westphal, King & Ramsay, Lim. The contracting parties were Westphal, King & Ramsay, Lim., and Austrian consignees, and I cannot see how Brandt & Co. can have power to thrust themselves into the contract after the outbreak of war, in order, as it is stated in one of their letters put in, "to protect the interest of the shipment, retaining the goods themselves to meet the draft." If Brandt & Co. had accepted on August 24 on behalf of the enemy, I am inclined to think that this case would come under the case of *THE RAPID* (*Scott's Cases on Int. Law*, 557; 8 Cranch, 156), and the goods would be liable to confiscation; but it appears that they intended to accept on their own behalf, and not on behalf of the enemy. It may be that this was done for the purpose of defeating the prize law with regard to bankers' lien and converting their lien into direct ownership.

I hold, therefore, in this case that there has been no such acceptance as is sufficient to pass the property in the goods; and as the contract is one of "documents against acceptance" the property in the goods remains vested in the consignors, Messrs. Westphal, King & Ramsay, Lim., and the order of the Court is that these goods be released to that firm.

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[Reported by Norman Bentwich, Esq., Barrister-at-Law]

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[IN H.B.M. SUPREME COURT FOR EGYPT. IN PRIZE.]

(Sitting at Alexandria.)

GRAIN, J. Oct. 21, 1915.

THE DERFFLINGER (No. 3).

*Partnership—Enemy Firm—Dissolution by War—Shares of British Partners—Shares of Naturalised Enemy Subject—Commercial Domicile—Application for British Naturalisation—Effect.*

*A partnership between British and German subjects, framed according to English law, carried on business in China as a German firm under the control of the German consular authorities. The British partners severed all connection with their German partners within a reasonable time after the outbreak of war:—Held, that the partnership was dissolved by the outbreak of war, and the interest of the British partners in goods captured at sea and seized as prize should be released to them proportionately to their shares in the partnership, the goods being the property of the individual members, and not the property of the firm.*

*A commercial domicile cannot be established in England without proof of a certain amount of permanent residence and intention to remain in the country:—Held, therefore, that a Swiss who became a naturalised German in 1908, and who, though resident in England since 1909 and an applicant for British naturalisation, agreed in the partnership deed to reside and carry on the business abroad, had not acquired an English commercial domicile, and that his share in the goods of the partnership must be condemned.*

This was a suit for the condemnation of goods laden on board the German steamship *Derfflinger*, which was seized at Port Said in October, 1914, and condemned as prize. The goods were claimed as the property of British and neutral members of a partnership firm, which carried on business in London, China, and elsewhere. The Crown claimed that the

whole interest in the goods was subject to condemnation on the ground that the firm was a German firm, whose business centre was in China, and had therefore an enemy domicile. The facts and arguments appear from the judgment.

*Arthur Preston (H.B.M. Procurator-General), for the Crown.*  
*G. A. W. Booth, for the claimants.*

GRAIN, J.—The claimants in this case are a firm who are carrying on business in London, Berlin, New York, and most of the ports in China and the Far East under a partnership agreement dated November 12, 1912, drawn up by Messrs. Coward & Hawksley, Sons & Chance, solicitors in London.

The firm is styled under the agreement Arnhold Karberg & Co., and consists of Harry Arnhold, Charles Herbert Arnhold, Ernest Goetz, and Max Niclassen. The two Arnholds are British subjects, Goetz a born Swiss subject who has become a naturalised German subject, and Niclassen a born German subject. Their business was established in China in 1866 and in London in 1871.

The shares of the business are divided as follows: H. E. Arnhold 32-44/100, Goetz 15-96/100, Niclassen 15-96/100, C. H. Arnhold 10-64/100, and 25/100 goes to some one named Thekla Emma Elizabeth Arnhold, who is not a member of the firm.

The two Arnholds have for some years resided in Shanghai, and have since the outbreak of war dissolved partnership with the two German subjects, Goetz and Niclassen, and by a partnership agreement dated February 5, 1915, are now trading together under the name Arnhold Karberg & Co. in London and Shanghai; and under an Order in Council of September 24, 1915, are one of the firms in China and Siam to whom all articles can be exported. Niclassen resided at Berlin, and is still in Germany. Goetz, who since 1909 has resided in London, has been interned in England.

Although the original firm was a partnership under an English agreement and under English law, according to an affidavit of H. E. Arnhold "the firm of Arnhold Karberg & Co. for the purposes of its business in China has been and remains registered at the German Consulate-General at Shanghai, in



accordance with German law, as a German firm, and so far as the business and assets or any of the partners in the said firm are within the jurisdiction or control of the German Consular authorities in China, the said firm is liable to be treated in all respects as subject to German law. In particular, the said German Consular authorities will not, so far as their jurisdiction extends, permit the said firm to be dissolved or wound up, or its property or assets to be dealt with in derogation of the rights of the German partners in the firm, and will not permit the British partners to take over the property and assets of the said firm, or to carry on its business otherwise than for the benefit of all partners in the firm."

According to the original partnership agreement of November 12, 1912, H. E. Arnhold was the leading member of the firm, and "the final decision in all matters of vital importance concerning the business of the firm shall be vested in him, also the right of veto in all matters concerning the business of the firm."

Mr. Booth appears on behalf of Arnhold Karberg & Co., and asks for the release of the shares of the cargo which under the partnership agreement would have belonged to H. E. and C. H. Arnhold and Goetz. He admits that he has no claims to a release as regards the share of Max Niclassen, the German subject in Berlin, and the 25/100, which, by clause 7 of the 1912 partnership agreement, is to be dealt with in accordance with an agreement made in Hamburg between the parties and Thekla Emma Elizabeth Arnhold, who is also in Germany.

The Procurator opposes the claim for release of the two Arnholds' and Goetz's shares on the ground that the parties concerned are really German; that, whatever the particular nationality of individual partners, it is a German firm, whose business centre is in China. And he points out that of their own choice they have registered themselves at the German Consulate at Shanghai according to German law as a German firm; that consequently all claims amongst the firm would be dealt with by the German Court at Shanghai; and he urges that this firm must be dealt with as a firm, and that, as a firm, they have adopted a German domicile in Shanghai.

Mr. Booth, on behalf of the claimants, points out that this is not a limited company, but a partnership, and that it is the

commercial domicile of the individual partner which has to be looked to, and that the goods are not the property of the partnership, but of the individual members, according to their shares under the agreement.

As regards the two Arnholds, they are, he urges, born British subjects resident in Shanghai, and that the registering of the firm at the German Consulate does not alter their individual *status*. He states that the two Arnholds themselves were probably registered at the British Consulate, and that contention, he suggests, is supported by a letter from the British Consul-General at Shanghai dated December 30, 1914, in which the Consul-General states:

"I am filing your declaration and sending the duplicate enclosed in yours of yesterday to Hankow with the remark that I consider that when you have advertised your new firm you have done your best to prove its independence of your former partnership."

The Procurator suggests that as there is no evidence that they were registered at the British Consulate, it must be assumed that they were not, as, if they were, they would have been sure to place evidence before the Court of such registration, and urges that they only went to the British Consulate when they found it necessary to get rid of their connection with enemy subjects, and did not do that till the last moment possible. Mr. Booth urges that they severed their connection with the enemy partners as soon as reasonably possible.

With regard to the severance from the enemy connection by the two Arnholds, it appears to me that they did rid themselves of these partners within a reasonable time after the outbreak of war.

The partnership itself was dissolved by the declaration of war—*GRISWOLD v. WADDINGTON* [1819] (16 Johnson's Rep. 438; *Scott's Cases on Int. Law*, 504)—as it is definitely laid down in many cases before and since the present war that all contracts with enemy subjects became dissolved on the outbreak of war.

On December 30 it appears from the British Consul-General's letter quoted above that they had already taken steps to advertise their severance from the enemy parties.

On February 5, 1915, the two Arnholds entered into a new partnership agreement with each other, to date from January 1.

1915, under which they were to trade together as Arnhold Karberg & Co. in London, America, and China, and they are now, in fact, so trading.

In *THE CLAN GRANT* (*ante*, p. 272), which came before Sir Samuel Evans in the Prize Court in England, the partnership was between three German subjects, two of whom resided in Germany, and one H. E. Hehlen, who resided at Khartoum. The German Hehlen having presumably acquired a domicile in Khartoum, it was admitted without argument that he had a right to a release of his share of the partnership, while the other two had their shares confiscated. As regards the two Arnholds, they have a stronger case, because they are British-born subjects residing in China, and are not enemy subjects, as was the case with Hehlen in *THE CLAN GRANT* (*ante*, p. 272).

I have no doubt that it is my duty to release to the two Arnholds their partnership shares of this cargo. But with regard to Goetz I have a more difficult matter to deal with.

Goetz was a Swiss, who, for some reasons of his own, became a naturalised German subject in 1908. Mr. Booth argues that he has established an English commercial domicile because he has resided in London since 1909.

A definition of Dicey in his *Conflict of Laws* (2nd ed. 1908) has already been referred to in this Court—namely, “A commercial domicile is such residence in a country for the purpose of trading there as makes a person’s trade or business contribute to or form part of the resources of such country, and renders it, therefore, reasonable that his hostile, friendly, or neutral character should be determined by reference to the character of such country” (p. 742). Pitt Cobbett states that “a commercial domicile is a settled residence in a particular country for the purpose of trade, by virtue of which a person, even though a subject of some other State, is deemed so far identified with the State in which he resides and trades as to share its national character, whether as belligerent or neutral, in time of war”—*Leading Cases on International Law* (3rd ed.), vol. ii. pp. 23, 24.

What do the authorities in Great Britain think of Goetz’s trade or business forming part of the resources of Great Britain and of his “hostile, friendly, or neutral character,” or as to his

being so far identified with the State as to share its national character? They have interned him.

By the original partnership agreement, which is dated November, 1912, it was laid down that "Goetz should reside and carry on the business abroad," and as the agreement was drawn up by English solicitors in London, and according to English law, it is safe to assume that abroad means out of England. The agreement goes on to say "unless otherwise decided by the said Harry Edward Arnhold"; so it appears that Goetz could be moved about whenever H. E. Arnhold liked. Now a domicile, whether civil or commercial, implies a certain amount of permanent residence with an intention to remain; and in this case we have a man who becomes a German subject in 1908, and signs an agreement to live out of England in 1912.

As regards Goetz's residence in London since 1909, the only evidence we have is an affidavit of C. H. Arnhold, who has been living in Shanghai, who says "the said Goetz has resided in London since the year 1909," and "he has applied for British naturalisation." For aught that I know, or even that C. H. Arnhold may know, Goetz may have passed his time going to and fro to Germany. No date has been given as to when he applied for naturalisation as a British subject; it is not improbable that it was at the outbreak of war.

Does it seem probable that a man who turns himself from a Swiss into a German in 1908 has a permanent intention of becoming a resident and member of British society in 1909, especially when he can be moved off abroad or elsewhere at any time by H. E. Arnhold?

Mr. Booth has quoted *NIGEL GOLD MINING CO. v. HOADE* [1901] (2 K.B. 849), *THE HARMONY* [1800] (2 C. Rob. 322; 1 Eng. P.C. 241), *THE JONGE KLASSINA* [1804] (5 C. Rob. 297; 1 Eng. P.C. 485), and also *Pitt Cobbett*, vol. ii. p. 25, on trade domicile and the various cases recently on the right of an interned person to sue, and has deduced very able arguments from those cases. But I am of opinion that Ernest Goetz is an enemy subject who has not divested himself of his enemy character by means of the acquisition of a trade domicile in England or otherwise, and that his share in this cargo must be condemned.

The order of the Court will therefore be for the release to

Harry Edward Arnhold of 32-44/100 of the cargo and a release to Charles Herbert Arnhold of 10-64/100, and confiscation as enemy property of Goetz's 15-96/100, Niclassen's 15-96/100, and the 25/100 share under the Hamburg agreement with Thekla Emma Elizabeth Arnhold.

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[*Reported by Norman Bentwich, Esq., Barrister-at-Law.*]

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Where goods seized as prize are released on bail, the amount of which has been fixed by agreement between the parties, such amount, in the absence of special circumstances, is to be taken as the admitted value of the goods, so that if the goods are condemned, and have realised less than the amount of the bond, the full amount of the bond must be paid into Court.

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**CARGO.**

*Cargo—Enemy Goods—Neutral Ship—Delivery to Collector of Customs—Mistake of Fact—Seizure as Prize—Freight—Insurance.*

Before the outbreak of war certain goods were shipped by Turkish merchants on a German vessel, and consigned to agents for sale at Malta. In consequence of the outbreak of war between Great Britain and Germany the German vessel deviated to a neutral port, and the goods were transhipped and forwarded by a Greek steamship to Malta, where they arrived after a state of war existed between Great Britain and Turkey. In the belief that the goods were the property of the Maltese consignees, they were handed over by the ship to the Collector of Customs:—*Held*, that, having been voluntarily handed over, when put overside into lighters the goods were no longer covered by the neutral flag, and, as enemy property seized afloat, were confiscable as prize. *Held*, further, that while the Greek ship-owners were entitled to freight for the carriage of the goods to Malta, a claim for the freight paid to the German shipowners by the Greek steamship company in order to obtain the release of the goods, and war risk insurance placed by them with a German insurance company, must be disallowed.

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— *Enemy Pledgors—Default—Contracts of Sale Entered into by Pledgees—Pledgor's Loss of Right to Redeem—Enemy Character of Goods Changed.* PAGE

Before the outbreak of war a German firm at Hankow contracted to sell certain goods to a British firm in Liverpool. The goods were shipped on a British vessel, and an advance was obtained from a Japanese bank upon the security of the shipping documents, which were indorsed to the bankers. After war broke out the British merchants refused to take up the goods or the documents representing the goods, and, the German firm being in default, the bankers, as pledgees, contracted to sell the goods to another British firm. Subsequently, when the vessel arrived at Liverpool, the goods were seized as prize:—*Held*, that when the contracts of sale were entered into by the bankers, whether or not the property had passed to the purchasers, the enemy pledgors lost the right to redeem and ceased to be the owners of the goods, and therefore at the time of seizure the goods were no longer enemy property, and must be released.

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— *Enemy Ship—Discharge in Port—Storage in Customs House Shed—Neutral Property when Landed—Seizure as Enemy Property in Port—Validity.*

Part of the cargo of a captured enemy ship was discharged in an Egyptian port and stored at the Customs warehouse. At the time of discharge the cargo, which belonged to a Turkish railway company, was neutral property. After the outbreak of war between Great Britain and Turkey the cargo was seized as prize by the Marshal:—*Held*, that the seizure was lawful, and that the cargo was subject to confiscation.

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— *Enemy Ship—Presumption as to Cargo Laden on Board—Onus of Proof.*

According to prize law, goods on an enemy vessel consigned to an enemy port are *prima facie* enemy goods, and the onus is on claimants who allege that the goods belong to them, as neutrals, to satisfy the Court with clear evidence.

THE ROLAND . . . . . 188

— *Neutral Vessel—Conditional Contraband—Date of Seizure—Condemnation of Cargo—Delay of Vessel—Shipowners' Claim to Freight and Demurrage—Declaration of London, 1909.*

On September 16, 1914, a neutral vessel left a neutral port with a cargo of iron ore consigned to neutrals at another neutral port, but destined for Krupp's works at Essen, in Germany. On September 19, when the vessel arrived off the Isle of Wight, she was stopped by a British warship and ordered to go to an anchorage for the examination of her papers and cargo. By a proclamation of September 21, 1914, iron ore, which had been on the free list, was placed by Great Britain on the conditional contraband list. On September 26 the cargo was detained, and on October 4 formally seized as prize, and the vessel was sent to another port for its discharge.

At the hearing of the suit for the condemnation of the cargo the shipowners claimed freight and demurrage or damages for detention. The Crown resisted the claim on the ground that the shipowners were acting as agents for the forwarding agents of Krupps.

*Held*, first, that the effective seizure took place after iron ore had been put on to the conditional contraband list, and that the cargo must be condemned; secondly, that as the cargo was innocent when the vessel started on her voyage, her owners, notwithstanding the fact that they might have business relationship with Krupps, were entitled to some freight, to be calculated in accordance with the principles laid down in *THE JUNO* (*ante*, p. 151); thirdly, that the claim for demurrage or detention must be disallowed.

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— *Passing of Property—Ante-bellum Contract—F.o.b. Contract of Sale—Bill of Lading and Insurance Policy Retained by Sellers—Part Payment.*

In June, 1914, pursuant to a contract of December, 1913, entered into between a British company as sellers and a German company as buyers, a cargo of chrome ore was loaded in a Norwegian sailing ship at a port in New Caledonia for delivery at Rotterdam. In accordance with the terms of the contract, which provided a fixed price per ton f.o.b., 50 per cent. to be paid on shipment, the German company paid half the purchase price, effected the insurance, and sent the policy to the sellers before loading. The bills of lading made out in favour of the sellers, or order, for delivery at Rotterdam, were also sent to and retained by them. The ship sailed on June 9. On September 6, when she put into Pernambuco, her master heard of the outbreak of war, and instructions were cabled to him by the German company, who were the charterers, that the ship was to proceed to Gothenburg instead of to Rotterdam.

By an Order in Council of October 29, 1914, chrome ore was declared absolute contraband. On November 2 the ship was captured at sea and taken into a British port, and a writ in prize was issued against the cargo.

Claims were entered by the British company, who claimed that the property in the cargo remained in them; and by a Swedish company, who claimed that the German company, as their agents, had bought the cargo for them:—*Held*, first, that the sellers had not reserved the right of disposal, and that the property in the goods passed to the German company on shipment and part payment; secondly, that on the evidence the alleged agency was an invention, and that the pretended agreement between the Swedish and German companies was made in the endeavour to convert *in transitu* enemy goods into neutral goods; and thirdly, that article 43 of the Declaration of London, which provides that "if a vessel is encountered at sea while unaware of the . . . declaration of contraband which applies to her cargo the contraband cannot be condemned except on payment of compensation," applies only to neutral cargo, and that being enemy cargo, the goods were subject to condemnation without compensation.

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— *Passing of Property—Ante-bellum Contract of Sale—  
Post-bellum Shipment—C.i.f. Contract—Allied Ship—Trading  
with the Enemy—Freight.* PAGE

Under a contract of July 13, 1914, made between the sellers, a firm of German merchants at Hamburg, with a branch at Valparaiso, and the buyers, a Dutch firm at Veendam, Holland, a cargo of nitrate of soda was loaded at Taltal, Chili, in a Russian sailing ship, which had been chartered by the German firm to carry the cargo to Delfzil, Holland. Loading began in July, but was not completed until after the outbreak of war. The bills of lading, dated August 6, were made out to the order of the sellers. The ship sailed on August 29. On December 6 she arrived at Plymouth, where the cargo was seized as enemy property.

The contract of sale provided that payment, to include cost and freight, was due ninety days after receipt of the first bill of lading, and was to be paid three days after maturity, or, in case of an earlier arrival of the ship, against acceptance of the documents. The buyers were to provide a banker's guarantee for 5,000*l.* for the due performance of the contract, the value of the cargo being 22,115*l.* Insurance, including war risk, was to be covered by the sellers, the buyers to accept the policy against payment of the premium. The buyers provided the banker's guarantee, and deposited the purchase price in the sellers' bank with instructions not to part with it until all the bills of lading had arrived. The bills of lading, which were made out in sets of three copies each, were forwarded to the sellers' house in Hamburg. The first copies arrived on September 9, and the third arrived by January 25, 1915; but they remained at the sellers' bank in Hamburg, and were not taken up until after the cargo had been seized.

It was contended by the Dutch buyers that the property had passed to them.

*Held*, that the *prima facie* presumption—arising from the fact of the bills of lading being to the order of the sellers—that the sellers had reserved the right of disposal, was not rebutted by the requirement of the banker's guarantee; that the parties did not intend the property in the goods to pass to the buyers until the documents were accepted and the price paid; that if the property did not pass on shipment it could not pass while the goods were *in transitu* so as to defeat the rights of belligerents; and that at the time of seizure the property was in the enemy sellers, and the goods must be condemned.

*Held*, further, that on the outbreak of war between Russia and Germany it became illegal for the Russian shipowners to continue to perform their contract with the German charterers; that, after August 4, when Germany became the common enemy of Russia and of Great Britain, a British Prize Court had power to deal with a Russian vessel engaged in illegal trading; and that strictly the vessel was liable to confiscation, and, although the Crown did not ask for this penalty, that a claim of the Russian shipowners for freight and expenses must be disallowed.

— *Passing of Property—Bills of Lading Indorsed to "selling agents"—Payment of Drafts Refused—Intention to Pass Property—Effect.*

Under an arrangement entered into between a number of lead producing companies, before the outbreak of war an American corporation shipped a quantity of lead under bills of lading which were indorsed to a German metal company at Frankfort, described as "selling agents." By the terms of business between the parties the corporation did not reserve any right of disposal of the goods after shipment. The bills of lading and an invoice were forwarded to the German company, and the shippers drew on a British company, who were parties to the arrangement, for the provisional price, which was not the exact price at which the goods were sold by the selling agents, less commission, but a price fixed by computation of sales supplied by other producers. On August 5, 1914, the lead was seized as prize, and on August 8 the British company, owing to the outbreak of war, refused to honour the draft. The American corporation claimed that the property in the goods still remained in them:—*Held*, that, even if the German company were merely selling agents, the property in the goods could still pass to them from the American principals; that the question whether the property had passed depended on the intention of the parties, and was a question of fact; and that on the facts the property had passed, and was therefore enemy property at the time of seizure.

THE KRONPRINZESSIN CECILIE . . . . . 623

— *Passing of Property—Contract of Sale C.i.f.—Shipment during Peace—War Supervening on Voyage—Seizure as Prize—Refusal of Documents—Test for Condemnation—Cargo in British Vessel not Excused.*

When goods are contracted to be sold, and are shipped without any anticipation of imminent war, and are taken as prize after war has supervened, the cardinal principle is that they are not subject to condemnation unless under the contract the property in the goods has at the time of seizure passed to the enemy. Enemy cargo, shipped without any anticipation of imminent war, and taken as prize in port or at sea after war has supervened, does not escape condemnation because it is in a British vessel.

Before any anticipation of imminent war sellers made a c.i.f. contract of sale of wheat to buyers, and in fulfilment of the contract sub-contracted with a merchant to buy wheat shipped by him, and received from him the bill of lading for it, which was indorsed generally. War supervened during the voyage. The sellers were neutrals, and the port of destination was neutral, but the buyers to whom the goods were to be delivered at the port of destination were enemies in the enemy country. The sellers' bankers, who were neutrals, had discounted the bill of exchange drawn by the sellers on the buyers, and had forwarded it and the bill of exchange and the certificates of insurance to a bank in the enemy country for tender of the latter documents against acceptance of the bill of exchange. The vessel was British, and was diverted to a British port,

where the wheat was seized by the Crown as prize. Shortly after the seizure the enemy buyers in the enemy country refused to take up the documents. The sellers claimed the wheat as their property. It was contended for the Crown that the test for condemnation was whether the enemy or the neutral would suffer the loss if the wheat was condemned, and that, as the sellers had a right of payment against the buyers and had only a *jus disponendi* as holders of a bill of lading not indorsed to them, they could not recover the wheat:—*Held*, disallowing the contention of the Crown, that as the goods were shipped without any anticipation of imminent war the test for condemnation was as to whether the property in the wheat had at the time of seizure passed to the enemy, and that as it had not at that time passed to the buyers, and would not so pass until they took up the documents, the wheat remained the property of the sellers, and must be restored to them.

THE MIRAMICHI . . . . . 137

— *Passing of Property—Delivery of Documents against Acceptance of Draft—Incomplete Acceptance—Delivery of Documents before Acceptance—Effect.*

Goods were shipped by a German firm at Hamburg to a Japanese firm at Tokio, the terms of the contract being delivery of the documents against acceptance of the sellers' draft. The sellers drew on the London agency of a German bank for the account of the buyers, and the draft was marked for acceptance at the bank three days before the outbreak of war. The bank then parted with the documents to the agents of the consignees. Owing to the outbreak of war the acceptance was never completed:—*Held*, that the property in the goods had not passed to the consignees, and the goods must be condemned as enemy property.

THE LUTZOW (No. 2) (Egypt) . . . . . 533

— *Passing of Property—Enemy Vessel—Enemy Consignor—Neutral Consignee—Acceptance of Bill of Exchange before Outbreak of War—Special Conditions of Sale—"No arrival, no sale"—Effect.*

Where goods, seized as prize, were consigned on an enemy vessel, before the outbreak of war, by an enemy seller to a neutral purchaser who accepted the bill of exchange, and the terms of the contract contained the words "no arrival, no sale,"—*Held*, that this was a condition inserted for the benefit of the seller, and did not prevent the property passing to the buyer on shipment and acceptance of the bill, and the goods, therefore, being neutral property at the time of seizure, must be released.

THE DERFFLINGER (No. 2) (Egypt) . . . . . 398

— *Passing of Property—Ownership—"Documents against acceptance"—Enemy Consignee—Qualified Acceptance by British Firm after Outbreak of War—Trading with the Enemy—Effect.*

Before the outbreak of war certain goods were shipped by a British firm to enemy consignees, the terms of the contract pro-

viding for delivery of the documents against acceptance of the seller's draft. After the outbreak of war the draft was accepted by an English firm "to protect the interests of the shipment":—*Held*, that the acceptance was not on behalf of the consignees, and did not amount to trading with the enemy, nor was it sufficient to pass the property in the goods, which therefore remained vested in the consignors.

THE KOERBER (No. 2) (Egypt) . . . . . 640

— *Passing of Property—Ownership—Enemy Consignors—Friendly Consignees—"Documents against acceptance"—Letter of Credit to Accept Drafts for Consignees—Effect.*

Before the outbreak of war certain goods were consigned by German shippers to Japanese consignees, the contract providing for delivery of the documents against acceptance of the seller's draft. On account of the outbreak of war the drafts drawn on the consignee's British bankers were not accepted. The bankers held a letter of credit authorising them to accept drafts on behalf of the consignees generally:—*Held*, that the letter of credit did not operate as an actual acceptance, and that the property in the goods had not passed to the consignees.

THE LUTZOW (No. 3) (Egypt) . . . . . 638

— *Sale in Transitu—Imminence of War—Belligerent Vendors—Neutral Purchasers—Outbreak of War—Seizure as Prize—Sale not in Contemplation of War—Validity.*

The rule of the Prize Court that property in goods is considered to be in the shipper until delivery, and that a sale *in transitu* is invalid, does not apply unless war is imminent and expected on the part of the vendor, and the sale is made to defeat the rights of belligerent captors.

Between July 20 and 30, 1914, German merchants sold to Dutch merchants various parcels of cargo *in transitu*, shipped on board a British steamship and consigned to a German port "to order." The Dutch merchants duly paid for the goods, which they re-sold to customers of their own. On August 4 war broke out between Great Britain and Germany, and when the ship called at a British port the cargo was seized as prize and afterwards sold:—*Held*, on the evidence, that war with Great Britain was not regarded as imminent—in its proper meaning of "threatening or about to occur"—by the German vendors when they sold the goods; that consequently the sales were valid and the goods were not confiscable as prize; and that the proceeds of sale must be released.

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## CARGO, MISDESCRIPTION OF.

*Contraband—Rubber manifested as "gum"* . . . . . 405

## CHINA, EUROPEANS IN.—See DOMICILE.

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*Passing of Property—Ante-bellum Contract of Sale—Post-bellum Shipment—C.i.f. Contract* . . . . . 579

*Passing of Property—Contract of Sale C.i.f.—Shipment during Peace—War Supervening on Voyage—Test for Condemnation.*

**CIVIL LIST ACTS.**

*Civil List Acts (1 Edw. 7. c. 4; 1 Geo. 5. c. 28)—Power of Crown to Exercise Bounty* . . . . . 554

**COASTING TRADE.**

*Deep-sea Fishing Vessel—Coast Fishing Vessel—Exemption from Capture* . . . . . 29

*Small Coasting Vessel Engaged in Local Trade—Vessels Exempt from Capture* . . . . . 259

**COMPANY.**

*British Company—Enemy Directors and Shareholders—Cargo—Enemy Character.*

Goods consigned to a duly incorporated British company, to which the property has passed, are not confiscable as prize by reason of the fact that all the directors and shareholders of the company are enemy subjects or domiciled in an enemy country. *CONTINENTAL TYRE & C. Co. v. DAIMLER Co., LIM.* [1915] (84 L. J. K.B. 926; [1915] 1 K.B. 893), applied.

*Quære*, whether a British company, composed entirely of alien enemies, can own a British ship.

*THE POONA* . . . . . 275

*Enemy Company—Branch Office in Allied Territory—Cargo—Seizure—Claim by Branch Office—Trading with Enemy Proclamation of September 9, 1914.*

Certain parcels of goods seized as prize were claimed by the shippers, the Japanese branch office of a German company with its head office at Hamburg. The goods were consigned by the claimants from Japan to their order, Hamburg. Section 6 of the Trading with the Enemy Proclamation (No. 2) of September 9, 1914, provides that "where an enemy has a branch locally situated in British, allied, or neutral territory, not being neutral territory in Europe, transactions by or with such branch shall not be treated as transactions by or with an enemy":—*Held*, that this proclamation did not protect the goods from condemnation; that the sole question was whether or not the goods were German goods; and that the goods must be regarded as the property of the German company, and not of the Japanese branch.

*THE EUMAEUS* . . . . . 606

*Enemy Limited Company—Appearance in Prize Court—Enemy Vessel—Owners* . . . . . 38

*English Company of Alien Shareholders—Enemy Ships—Sale before War—Invalid Transfer* . . . . . 16

**CONTINUOUS VOYAGE.**—See CONTRABAND.**CONTRABAND.**

*Cargo—Neutral Vessel—Conditional Contraband—Date of Seizure—Condemnation of Cargo* . . . . . 282

— *Neutral Vessel—Enemy Goods—Absolute Contraband—Ignorance of Owners—Declaration of London, 1909, art. 43.*

Article 43 of the Declaration of London, which provides that "if a vessel is encountered at sea while unaware of the . . . declaration of contraband which applies to her cargo the contraband cannot be condemned except on payment of compensation," applies only to neutral cargo:—*Held*, therefore, that enemy cargo of a contraband nature, laden on board a neutral vessel and consigned to a hostile destination, is subject to condemnation without compensation, although not declared contraband until after the vessel has sailed.

THE SORFAREREN . . . . . 589

*Neutral Cargo—Contraband—Requisition by Crown* . 261, 309

*Neutral Vessel—Contraband—Belligerent Charterers—Unneutral Service—Owners' Ignorance—Declaration of London, 1909, art. 40.*

By article 40 of the Declaration of London, 1909, "a vessel carrying contraband may be condemned if the contraband . . . forms more than half the cargo":—*Held*, that such a vessel is lawful prize, notwithstanding that her owners have no knowledge that she was being employed in carrying contraband.

THE LORENZO (St. Lucia) . . . . . 226

*Neutral Vessel—Contraband Cargo for British Government—Capture by the Enemy—Recapture* . . . . . 371

*Neutral Ships—Contraband Cargoes—Conditional and Absolute Contraband—Neutral Port of Destination—Enemy Government or Forces as Ultimate Destination—Doctrine of Continuous Voyage or Transportation—Evidence—Presumptions and Proof—Consignments "to order"—Misdescription of Cargo—Rubber Manifested as "Gum"—Orders in Council of August 20 and October 29, 1914—Validity and Effect—Declaration of London, 1909, art. 35.*

The doctrine of continuous voyage or transportation, whether by sea or over land, became part of the law of nations, both as regards the carriage of absolute and of conditional contraband, before the outbreak of the present war. Accordingly, the Prize Court has the duty of determining the real as distinguished from the ostensible destination of goods, absolutely or conditionally contraband, consigned to a neutral port in neutral vessels.

Prize Courts are not governed or limited by the strict rules of evidence which bind municipal Courts, and will recognise well-known facts which have come to light in other cases, or as matters of public reputation.

Captors must prove facts from which a reasonable inference of hostile destination can be drawn. But, as regards the



ultimate hostile destination of conditional contraband, captors need only shew a highly probable military or Government destination, and need not prove the particular enemy port or place of ultimate destination.

It is not incumbent upon captors to prove an intention on the part of the shippers at the commencement of the voyage, ostensibly to a neutral port, of despatching contraband goods to the enemy. If it is reasonably certain that the shippers knew the real ultimate hostile destination, whenever the project may have been conceived, a belligerent has a right to seize and confiscate the goods.

If, after the outbreak of war, neutral shippers consign goods of a contraband nature "to order" without naming a consignee, it is a circumstance of suspicion which a Prize Court may take into account in considering whether the goods were really intended for a neutral destination or whether they had an ultimate hostile destination.

Contraband articles contaminate the whole cargo belonging to the same owners, and the non-contraband portion must share the fate of the contraband.

Any concealment or misdescription calculated and intended by neutrals to deceive belligerents in their right of search for contraband will weigh heavily against those responsible for such practices when the Prize Court has to consider presumptions or inferences as to the real destination of goods of a contraband nature.

Rubber, manifested as "gum," released on the facts, the claimants not being responsible for the misdescription.

Orders in Council of August 20 and October 29, 1914, discussed.

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*Neutral Ship—Conditional Contraband—Seizure—Delay of  
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**DESPATCHES, CARRIAGE OF.**

*British Vessel—Sub-charter to German Government—Innocence of Owners and Charterers—Carriage of Despatches for Enemy—Condemnation of Vessel and Cargo.*

A British vessel was chartered by its owners to a British company having a branch office at Nauru, a German island in the Pacific. On August 6, 1914, the company's agent at Nauru was approached by the German officials and informed that war had broken out between Germany and Russia, and that the German Government wanted a neutral vessel to convey a representative with despatches to the German Government at Rabaul, another German possession. The German officials concealed the fact that Great Britain and Germany were also at war, and accordingly the agent of the British company sub-chartered the vessel to the Imperial German Government for a voyage to Rabaul and back. In the course of the voyage the vessel was encountered by a British cruiser, the documents entrusted to the German representative were discovered, and the vessel and her cargo were taken into port as prize:—*Held*, that although the owners and charterers were innocent, yet as the vessel had been sub-chartered to, and was engaged in the service of, the enemy Government, and the cargo belonged to the charterers, whose agent had effected the sub-charter, both the vessel and her cargo must be condemned.

THE ZAMBESI (New South Wales) . . . . . 358

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*Enemy Ship—Dock Owners' Claims—Liberty to Apply . . . . .* 1

**DOMICILE.**

*Cargo—Residence in Enemy Country—Trade Domicile in Neutral Country—Condemnation of Share of Partnership Property.*

The property of an enemy subject who is domiciled in an enemy country, but has a house of trade in a neutral country, will be treated as enemy property; and if the property belongs to a partnership, in the absence of evidence to the contrary, it will be presumed to be divided proportionately between the partners, and the share attributable to the partner with an enemy domicile will be condemned.

THE CLAN GRANT . . . . . 272

*— Commercial Domicile — Extritoriality — Partnership Firm at Shanghai—Registration at German Consulate—British Partners—Registration at British Consulate—Severance of Connection with Partnership Firm.*

A firm consisting of two British and two German subjects carrying on business at Shanghai was registered at the German Consulate as a German firm in accordance with the regulations whereby the European communities, to which China has granted extritorial privileges, are governed by the laws of their respective countries. The British partners, who resided in Shanghai, were also registered as British subjects at the British Consulate. Neither of the German partners resided in Shanghai. Goods belonging to the firm having been seized as prize, they were claimed as being the property of the firm as neutrals, and alternatively as the individual property of the partners as neutral and British subjects:—*Held*, first, that the firm could not be treated as a neutral house of trade, and that for all purposes of prize it must be regarded as a German firm carrying on business in a German colony; secondly, that, under the circumstances, none of the partners had acquired, or could acquire, a neutral commercial domicile, and that the shares in the proceeds of the goods attributable to the German partners must be condemned; and thirdly, that, as regards the shares of the British partners, the case must be adjourned for further evidence as to what measures, if any, were taken by them to sever their connection with the firm on the outbreak of war.

THE EUMAEUS . . . . . 605

*Commercial Domicile—Residence in England—Application for British Naturalisation—Effect.*

A commercial domicile cannot be established in England without proof of a certain amount of permanent residence and intention to remain in the country:—*Held*, therefore, that a partner in a German firm carrying on business in China, a native of Switzerland who became a naturalised German in 1908, and who, though resident in England since 1909 and an applicant for British naturalisation, agreed in the partnership deed to reside and carry on the business abroad, had not acquired an English commercial domicile, and that his share in the goods of the partnership must be condemned.

THE DERFFLINGER (No. 3) (Egypt) . . . . . 643

*Enemy Subject — Trade Domicile in Neutral Country — Departure to another Neutral Country on Outbreak of War — Loss of Neutral Domicile.*

An enemy subject who has acquired a trade domicile in a neutral country loses that domicile if, on the outbreak of war, he leaves the neutral country for another neutral country in the absence of evidence that his departure is merely temporary.

THE FLAMENCO; THE ORDUNA . . . . . 509

*Exterritorial Jurisdiction — German Subject Carrying on Business in China — Non-acquisition of Trade Domicile.*

A trade domicile cannot be established by a person resident and carrying on business in a foreign country if the nation of which he is a subject has been granted the privilege of exterritorial jurisdiction in that country.

THE LUTZOW; THE KOERBER (Egypt) . . . . . 528

*Goods on Enemy Ship — Enemy Subject Resident in China — Trade Domicile — Exterritorial Jurisdiction.*

European Powers having the privilege of exterritorial jurisdiction in China, a German subject resident in Shanghai does not acquire a Chinese civil domicile for war purposes, as he remains subject to the jurisdiction of his own State:—*Held*, therefore, that the private effects of a German official in Chinese Government service, shipped on board a German vessel for delivery at his home in Germany, are confiscable as enemy property.

THE DERFFLINGER (No. 1) (Egypt) . . . . . 386

*Trade Domicile — Trade House in British Territory and in Enemy Country — Evidence of Intention to Change Domicile.*

A German merchant in Ceylon consigned goods on a German vessel to his trade house in Hamburg. For five years prior to the outbreak of war he had carried on business at Colombo, and for three years resided at a house there which he had rented and furnished, but he had returned once during the five years for several months to Germany:—*Held*, that this residence was not sufficient to establish a domicile in Ceylon; that his German domicile of origin still adhered to him; and that the goods, therefore, were subject to condemnation as enemy property.

THE ROSTOCK (Egypt) . . . . . 523

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**ENEMY SHIP.**

*Enemy Ship—British Mortgagees—Validity of Claim—Right to Appear and Argue against Condemnation of Vessel.*

British mortgagees of an enemy vessel cannot have their charge enforced by the Prize Court, but where the owners do not appear the mortgagees may be heard in the Prize Court to argue against the condemnation of the vessel.

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*— Capture at Sea—Ignorance of Outbreak of War—Hague Conference, 1907, Convention VI. art. 3.*

Apart from international convention, enemy merchant ships captured on the high seas in ignorance of the outbreak of hostilities are liable to condemnation. Article 3 of Convention VI. of the Hague Conference, 1907, which provides for the detention, instead of confiscation, of enemy vessels which left their last port of departure before the commencement of war and are encountered on the high seas while still ignorant of the outbreak of war, has no application to German vessels, the German Empire, when signing the Convention, having refused its assent to this article.

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*— Capture at Sea—Neutrals' Claim as Beneficial Owners—Prize Court Rules, 1898—Further Proof—Declaration of London, 1909, art. 43—Prize Court Rules, 1914, Order XXVIII. rule 1—Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 20—Prize Courts (Procedure) Act, 1914 (4 & 5 Geo. 5. c. 13).*

A merchant vessel, flying the German flag, was captured at sea by a British cruiser four days after the outbreak of war between Great Britain and Germany, and was taken into Bermuda. Proceedings in prize were commenced against her before September 3, 1914, when the Prize Court Rules of 1914 came into force in that colony, and the Court directed that the action should be continued in accordance with the procedure applicable under the Prize Court Rules, 1898. An application for further proof was made on behalf of a neutral company, in order to establish

that they were the beneficial owners of the vessel, owning the entire capital stock of the nominal owners, a subsidiary company established according to the law of Germany, and having its principal place of business in Hamburg:—*Held*, first, that the application must be refused, as the vessel, being under the German flag, and the claimants not alleging that she had been transferred to them, the facts sought to be proved would not benefit the claimants; secondly, that section 20 of the Naval Prize Act, 1864, which requires the Court . . . “to proceed with all convenient speed either to condemn or to release the captured ship,” was still in force for the purposes of the present case, and that Order XXVIII. rule 1 of the Prize Court Rules, 1914, which provides for detention in certain cases, had no application; thirdly, that article 43 of the Declaration of London, 1909, which provides that “if a vessel is encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband which applies to her cargo, the contraband cannot be condemned except on payment of compensation; the vessel herself and the remainder of the cargo are not liable to condemnation . . .,” only applies to ships other than enemy vessels having contraband on board; and fourthly, that the claimants’ contention that the vessel should be merely detained, and not confiscated, must be rejected.

THE LEDA (Bermuda) . . . . . 233

— *Deep-sea Fishing Vessel—Exemption from Capture—Coast Fishing Vessel—Hague Conference, 1907, Convention No. XI. art. 3—Practice—Legal Evidence of Capture—Other Evidence—Prize Court Rules, 1914, Order XV. rules 1, 2 (e).*

An enemy vessel, which is shewn by her size, equipment, and voyage to be a deep-sea fishing vessel engaged in a commercial enterprise which forms part of the trade of the enemy country, is not within the category of coast fishing vessels so as to be exempt from capture, but is good prize.

The commander of one of His Majesty’s ships who cannot take a captured vessel into port, or put a prize crew on board, ought to enter the time and place of capture in the vessel’s log, or make a declaration in the presence of the vessel’s master, so as to provide direct legal evidence thereof. But in the absence of such evidence the Court can act on other evidence or reliable information, and draw inferences therefrom, under the Prize Court Rules, 1914, Order XV. rules 1, 2 (e).

THE BERLIN . . . . . 29

— *Ignorance of Hostilities—Arrival off Belligerent Port—Orders to Proceed to Examination Anchorage—Capture—At Sea or Entering Port—Sixth Hague Convention, arts. 1 and 3.*

A German vessel arrived off Malta in ignorance of the outbreak of hostilities between Great Britain and Germany, and, on approaching the Grand Harbour, was ordered by the warning steamer, stationed in the offing for the purpose of directing vessels to an examination anchorage, to go to St. Paul’s Bay. Whilst on her way there she was met by two British destroyers, and told to follow one of them into St. Paul’s Bay, where she was left in charge of another British warship as prize of war:—

*Held*, that the vessel was captured at sea in territorial waters between the Grand Harbour and St. Paul's Bay; that she was not "Entrant dans un port ennemi" while still in ignorance of hostilities, within the meaning of article 1 of the Sixth Hague Convention; that that article did not apply to an enemy ship to which admission had been refused, and that, as Germany had refused her assent to article 3, which exempted from confiscation an enemy vessel "rencontré en mer" in ignorance of hostilities, she must be condemned.

THE ERYMANTHOS (Malta) . . . . . 339

— *Ignorance of Hostilities—Boarding at Sea—Permission to Continue Voyage—Subsequent Seizure in Belligerent Port—Duty of Prize Court to Act Equitably—Hague Conference, 1907, Convention VI., arts. 2 and 3.*

An enemy vessel, after being stopped at sea by a British cruiser and told of the outbreak of hostilities, was permitted to continue her voyage, and, thinking that it was a neutral port, she went into the port of Suez, where she was detained, and subsequently taken to sea and handed over by the Egyptian authorities to another British warship:—*Held*, that although the vessel could not claim any right under article 2 of Convention VI. of the Hague Conference, a British Prize Court should give effect to the object of the Conventions and should interpret the rules of international law in a broad spirit, and since the vessel had derived her information from a British cruiser, which had allowed her to proceed, she should not be confiscated, but merely detained and restored to her owners at the end of the war.

THE MARQUIS BACQUEHEM . . . . . 130

— *In Belligerent Port at Outbreak of War—Offer of Safe Conduct—Failure to Use—Erroneous Representation as to Neutrality of Port—Renewed Offer of Safe Conduct—Seizure in Port.*

An enemy vessel, lying at Port Said at the outbreak of hostilities, was offered a safe conduct to a neutral port available for ten days, but she did not use it. On the expiration of the time limit no steps were taken against her, and instructions as to the user of the port were issued, indicating that the Egyptian Government intended to treat Port Said as a neutral harbour. Subsequently the offer of a safe conduct was renewed, but the vessel continued to remain, using the port as a port of refuge for about eight weeks, when she was seized as prize:—*Held*, that as the vessel had failed to take advantage of the first offer of a safe conduct, when no suggestion as to the neutrality of the port had been made, she was liable to condemnation.

THE PINDOS (Egypt) . . . . . 248

— *In British Port—Commencement of Hostilities—Order in Council—Days of Grace—Less Favourable Treatment by Enemy—Detention—Second Hague Peace Conference, 1907, Convention IV. art. 23 (h)—Convention VI. arts. 1, 2—Prize Court Practice—Enemy Shipowner—Resident in Enemy Country—Affidavit as to Appearance—Insufficiency—Dock Owners—Liberty to Apply.*

A German merchant steamship was lying in a British port  
P.C.C. 42

when war was declared to exist between Great Britain and Germany, and was seized on behalf of the Crown by the Collector of Customs of the port as a droit of Admiralty. Article 1 of Convention VI. of the Second Hague Peace Conference, 1907, provided that when a belligerent merchant ship was, at the commencement of hostilities, in an enemy port, it was desirable that it should be allowed to depart freely, either immediately or after a reasonable number of days of grace; and article 2 provided that a merchant ship which was not allowed to leave might not be confiscated, but the belligerent might merely detain it on condition of restoring it after the war. By Order in Council dated August 4, 1914, it was ordered that enemy merchant ships, which at the outbreak of hostilities were in any British port, should be allowed till August 14 for departing from such port, if information was obtained that the treatment of British merchant ships in an enemy port was not less favourable. This information was not obtained by the British Government, so that effect could not be given to article 1 of Convention VI. The Court was asked on behalf of the Procurator-General for an order for the detention of the ship:—*Held*, that an order should be made that the ship belonged, at the time of seizure, to enemies of the Crown, and had been properly seized by the officers of the Crown, and was to be detained by the Marshal till further order.

The writ in this cause was in the prescribed form and had been issued by the Procurator-General, and was duly advertised. It was addressed to the owners and parties interested in the ship, and commanded them to cause an appearance to be entered for them. Counsel for the German owners, resident in Germany, contended that they were entitled to appear, but the affidavit as to appearance, which was made by a member of a London firm described as agents of the owners, did not state who were the owners of the vessel, or any special circumstances entitling them to appear:—*Held*, that the affidavit was wholly insufficient to entitle the enemy owners to appear.

Dock owners, to whom considerable sums had accrued, and were accruing, in respect of the ship, were given liberty to apply to the Court.

THE CHILE . . . . . 1

— *Loading in Belligerent Port—Days of Grace—Non-application to German Vessels—Order of Governor-General in Council—Invalid Transfer—History of Prize Court in Canada.*

A German barque, loading cargo in a Canadian port at the outbreak of war between Great Britain and Germany, was seized as prize by the Collector of Customs on August 5, 1914. By an order of the Governor-General in Council of the same date it was provided (*inter alia*) that if information was received by His Majesty's Government, not later than midnight on August 7, that the treatment of British merchant ships and their cargoes in an enemy port was not less favourable than the treatment accorded to enemy merchant ships, under the Order (article 2), enemy merchant ships in Canadian ports at the outbreak of hostilities should be allowed days of grace in which to load or unload their cargoes and depart (article 3). In the event of this information not being received, the Order



provided that such ships, together with their cargoes, should be liable to capture (article 9). The information was not received, and the Secretary of State for Foreign Affairs notified the Lords Commissioners of the Admiralty that articles 3 to 8 of the Order would not come into operation as regards Germany. Counsel for the Crown asked for an order for detention, as in *THE CHILE* (p. 1; [1914] P. 212):—*Held*, that the ship and cargo must be detained until further order.

The claim of a Portuguese subject, who alleged that the ship had been transferred to him whilst she was on the high seas, and before the outbreak of war, was dismissed with costs, there being no proper bill of sale to complete the transfer before the war, and no registration under the Portuguese flag until a date subsequent to the seizure of the vessel.

*THE BELLAS* . . . . . 95

— *Practice—Enemy Owner—Right to Appear—Capture in “port” or “at sea”—Detention or Condemnation—Hague Peace Conference, 1907, Convention VI. arts. 2 and 3.*

Apart from the new practice of the Prize Court, an enemy shipowner who alleges no suspension of his hostile character has no right to appear in the Court to argue that his ship, though enemy property, is not subject to condemnation, but only to detention, under a Convention of the Hague Peace Conference, 1907.

The future practice of the Prize Court shall be, that any alien enemy, claiming any protection, privilege, or relief under any such Convention, shall be entitled to appear as a claimant and argue his claim before the Court. He should state the grounds of his claim in his affidavit to lead appearance.

An enemy merchant ship was captured on August 5, 1914, at a place in the Firth of Forth, which was not within the limits of a “port” in the usual commercial sense, but was within the limits of the “port” of Leith for Customs purposes:—*Held*, that the word “port” in the Sixth Hague Convention, 1907, did not mean the fiscal port, but must be construed in its usual and limited popular or commercial sense as a place where ships are in the habit of coming for the purpose of loading and unloading, embarking or disembarking, and that the vessel, when captured, was not, within the meaning of article 2 of this Convention, at the commencement of hostilities in an enemy “port” and not allowed to leave, so as to be subject only to detention, but was encountered “at sea” within the meaning of article 3 of this Convention, of which this vessel could not claim the benefit, and that the vessel must therefore be condemned as prize.

*THE MÖWE* . . . . . 60

— *Offer of Pass to Neutral Port—Condition—Failure to Use Pass—“Circumstance beyond control”—Master’s Lack of Funds—Hague Conference, 1907, Convention VI. arts. 1 and 2.*

An enemy vessel, lying in a belligerent port and entitled to days of grace, was offered a pass to her port of ultimate destination, which was neutral, on condition that she first discharged her cargo at another belligerent port. She refused the offer of the pass and remained in the belligerent port:—*Held*, that she was subject to condemnation.

*Held*, further, that the allegation of her master that it was impossible for him to proceed on the voyage because he had not sufficient funds, did not bring him within article 2 of the Sixth Hague Convention, which provides that "a merchant ship which owing to circumstances beyond its control may have been unable to leave the enemy port" may not be confiscated, more especially as the master had refused an advance from the consignees of the cargo.

THE CONCADORO (Egypt) . . . . . 390

— *Outbreak of War—Discharging in Belligerent Port—Offer of Safe-conduct Pass—Form of Pass—Refusal to Leave—Subsequent Detention—Hague Conference, 1907, Convention VI. arts. 1, 2.*

An enemy vessel, lying in a belligerent port at the outbreak of war, which fails to take advantage of permission to leave, accompanied by an adequate safe-conduct pass to a neutral port, is liable to condemnation.

THE ACHAIA (Egypt) . . . . . 242

— *Owners—Enemy Limited Company—Appearance in Prize Court—Shareholders—Claimants for Disbursements and Services—Bounty of Crown—Mortgagees—Capture at Sea—"Ignorant of the outbreak of hostilities"—Second Hague Peace Conference, 1907, Convention VI. art. 3.*

A German merchant steamship, owned by a German limited company resident in Germany, left a British port some hours before war commenced between this country and Germany, and was captured at sea while still ignorant of the outbreak of hostilities. Article 3 of Convention VI. of the Second Hague Peace Conference, 1907, provides that enemy merchant ships which left their last port of departure before the commencement of the war, and are encountered on the high seas while still ignorant of the outbreak of hostilities, may not be confiscated, but are merely liable to be detained, &c. This Convention was signed by Great Britain, but, when signed by Germany, article 3 was reserved. As regards this vessel—first, on behalf of the Crown, a decree of condemnation as prize was claimed; secondly, on behalf of the owners, it was contended that they were entitled to appear against this claim in the Prize Court, though the affidavit filed on their behalf did not shew any special circumstances entitling them to appear; thirdly, on behalf of certain shareholders in the vessels, and other claimants who had paid disbursements or rendered services in respect of the vessel, it was contended that they had some rights in the Prize Court in respect of the vessel; and fourthly, on behalf of neutral mortgagees of the vessel, it was contended that the amount due under the mortgage should be paid out of the proceeds of the vessel when sold:—*Held*, first, that article 3 of the said Convention VI. did not apply in the circumstances, and that the vessel must be condemned as prize and not merely detained; secondly, that the German owners had no right to appear in the Prize Court as no special circumstances were shewn entitling them to appear; thirdly, that the shareholders, and claimants in respect of disbursements, &c., had no rights in the Prize Court in respect of the

vessel, but could only apply to the bounty of the Crown; and fourthly, after a full review of the authorities, that the claim of the mortgagees must be rejected. PAGE

THE MARIE GLAESER . . . . . 38

— *Removal of Fugitives from Enemy Base—Expectation of Blockade—Philanthropic Mission—Second Hague Peace Conference, 1907, Convention XI. art. 4.*

An enemy ship carrying women and children fugitives from a naval and military base of the enemy, a blockade of which is expected, is not "employed on a philanthropic mission" within the meaning of article 4 of Convention XI. of the Second Hague Peace Conference, 1907, so as to exempt her from capture.

THE PAKLAT (Hong-Kong) . . . . . 515

— *Sale before War—Enemy Flag—Invalid Transfer—Detention—British Ship—English Company of Alien Shareholders—Declaration of London, 1909, arts. 55, 56, 57.*

On August 1, 1914, a German company, owning two German sailing vessels, both at sea and bound for ports in the United Kingdom, offered by telegram to sell them to an English company, which telegraphed acceptance. The vessels arrived in the ports, and were seized by Customs officers after war had been declared on August 4 between Great Britain and Germany. The English company claimed the vessels as having become their property by a valid transfer:—*Held*, that the vessels were enemy property, first, because the nationality of a vessel is determined by the flag which she is entitled to fly, whether at sea or in port, and that the flag which these vessels were entitled to fly was German; and secondly, because the alleged transfer was not valid, but was incomplete in certain respects, and amounted in substance to a mere arrangement by the German company that the vessels should be called British ships; and that the claim must be dismissed and an order made for the detention of the two vessels.

*Quære*, whether an English company, consisting entirely of aliens, can own a British ship.

THE TOMMI; THE ROTHERSAND . . . . . 16

— *Seizure in Belligerent Port—Safe Conduct—Use of Suez Canal Port as Port of Refuge—Hague Conference, 1907, Convention No. VI. art. 2—Form of Order—Retaliation—Right of Crown to Prizes Taken in Egyptian Ports.*

A British Prize Court is bound by Convention VI. of the Hague Conference, 1907. Accordingly, an enemy vessel using a port of the Suez Canal as a port of refuge, and which, although free to have left the port, has not been offered a safe conduct to a neutral port, can only be detained during the period of the war, and not confiscated. The COURT (GRAIN, J., dissenting) ordered that the vessel should be restored to her owners at the end of the war, or her value paid to them.

The British Crown is entitled to the benefit of the prizes seized in Egyptian ports, the Egyptian Government making no claim thereto.

THE BARENFELS . . . . . 122

— *Seizure in Suez Canal Port—Improper Use of Port—Status of Port Said—Suez Canal Convention, 1888—Décision of S.E. the Regent, of August 5, 1914—Hague Conference, 1907, Convention No. VI.—Position of Egypt—Circumstances of Capture—Right of Alien Enemy to Appear in the Prize Proceedings.*

A Prize Court is entitled to look behind the actual circumstances of the seizure by the British captor, and will examine the whole of the events which led up to the capture. The Suez Canal Convention, 1888, does not protect from capture vessels which are using the ports of the Canal, not for purposes of passage, but as places of refuge.

Ports Said and Suez are to be regarded as ordinary Egyptian ports when they are not used as ports of the Canal, and vessels lying up in them for refuge are to be treated as if they were in an Egyptian harbour.

Since the outbreak of hostilities between Great Britain and Germany Egypt cannot be regarded as neutral territory, and an enemy vessel which has been boarded by Egyptian officials and detained, and, at the instigation of Great Britain, is then escorted out to sea and there seized as prize by a British cruiser, must be considered to have been captured in a belligerent port.

An alien enemy is entitled to appear in a Prize Court to argue that his vessel is protected from capture by the rules of international law or an international convention.

THE GUTENFELS . . . . . 102

— *Small Coasting Vessel Engaged in Local Trade—Vessels Exempted from Capture—Hague Conference, 1907, Conventions VI. and XI. (art. 3)—Failure of Turkey to Ratify.*

There is no customary rule of international law, apart from Convention, protecting from capture small coasting vessels engaged in general local trade. The customary immunity from capture applies only to fishing vessels.

THE MARIA (Egypt) . . . . . 259

— *Submarine Signalling Apparatus—Lease to Shipowners—"Neutral goods"—Declaration of Paris, 1856, art. 3.*

A submarine signalling apparatus, fixed partly in the fore hold and partly in the chart room of an enemy's ship, was claimed by a neutral company who, as they alleged, leased the apparatus to the owners of the ship on terms which provided that rent should be paid and that the apparatus should remain the sole and exclusive property of the company:—*Held*, that the apparatus was not "neutral goods" under enemy's flag within article 3 of the Declaration of Paris, 1856, as "goods" there meant merchandise, which this was not; and that this apparatus being part of the ship in the Prize Court, be condemned with the ship.

THE SCHLESSEN . . . . . 13

— *Yacht—Outbreak of War—Detention in British Port—Days of Grace—Condemnation—Sixth Hague Convention—*

*Violation of its Provisions by the Enemy—Effect—Liability for Repairs—Dry Docking.*

The provisions of the Sixth Hague Convention, with regard to days of grace, are intended to protect vessels engaged in commerce, and do not afford protection to enemy yachts. Therefore a German yacht detained in a British port on the outbreak of war, according to the ordinary law by which enemy property seized in port is confiscable, is subject to condemnation. Claims in respect of repairs executed to the yacht before the detention, and in respect of dry docking afterwards, acceded to by the Crown as an act of grace.

*Quære*, whether a belligerent Power which has violated many of the provisions of the Hague Convention can claim the protection of any of its provisions from other contracting parties.

THE GERMANIA . . . . . 573

*German Ship—Deviation to Avoid Capture by French—Refusal to Admit to British Port—Outbreak of War between Great Britain and Germany—Subsequent Capture—At Sea or in Port—Entering Port for other than Commercial Purposes—Hague Conference, 1907, Convention VI. arts. 1 and 2.*

On August 3, 1914, a German liner bound from New York to Hamburg, having heard by wireless that war had broken out between France and Germany, deviated to the Bristol Channel, and on the afternoon of August 4 arrived off Newport (Mon.), not—as was suggested by her master—to get coal, but to avoid possible capture by French warships in the English Channel, and to get instructions from her owners. War between Great Britain and Germany being imminent, and fearing that damage might be intended to the docks, the port authorities refused the vessel admission and directed her to an anchorage further out in the channel. Early next morning, a state of war having existed between Great Britain and Germany since eleven o'clock on the previous evening, the vessel was boarded by port officials with an armed escort and brought into Newport.

The Crown claimed that the vessel was captured at sea and was liable to condemnation. The owners claimed that she was seized in port or while entering port, and was only subject to detention during the period of the war:—*Held*, that the vessel was captured at sea, and not in port or whilst entering port, and therefore she was not entitled to the protection afforded by article 1 of the Sixth Hague Convention and must be condemned. *Quære*, whether a vessel which is not entering a port for commercial purposes, but to avoid possible capture, is protected from confiscation under articles 1 and 2 of the Sixth Hague Convention.

THE BELGIA . . . . . 303

**ESTOPPEL.**—See RES JUDICATA.

**EVIDENCE.**

*Fishing Vessel—Legal Evidence of Capture—Other Evidence—Prize Court Rules, 1914, Order XV. rules 1, 2 (e) . . . . . 29*

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## EXTRATERRITORIAL JURISDICTION.—See DOMICILE.

## FISHING VESSEL.

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## FLAG, LAW OF.

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## F.O.B. CONTRACT OF SALE.

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## FREIGHT.

*British Ship—Cargo Loaded before War—Seizure—Release to  
Allied Claimants—Shipowner's Claim to Freight.*

According to prize law, when cargo loaded before war for carriage in a British ship is seized as prize before it reaches its port of destination, and is discharged and sold in a British port, and, without being brought before the Prize Court, the proceeds of sale are released, the shipowners are entitled to such a sum out of the proceeds for freight as is fair and reasonable in the circumstances, to be calculated in accordance with the principle laid down in *THE JUNO* (*ante*, p. 151).

<i>THE IOLO . . . . .</i>	291
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*— Enemy Cargo Loaded before War—Seizure—Shipowners' Claims—Freight—Expenses of Discharge—Ship's Delay.*

When enemy cargo, loaded before war for carriage on a British ship, is seized and ordered to be discharged in a British port, and is condemned as prize, such a sum is to be allowed out of the prize to the shipowners for freight as is fair and reasonable in the circumstances. Regard is to be had to the agreed freight—though this is not conclusive—to the extent to which the voyage has been made, the labour and cost expended or any special charges incurred in respect of the cargo before seizure and discharge, and to the benefit to the cargo from carriage until seizure and discharge. No sum is to be allowed, unless in special circumstances, for inconvenience or delay to the ship as the result of her diversion or detention for the seizure and discharge of her enemy cargo.

Certain parcels of German cargo were loaded shortly before the war on a British ship at Bristol for delivery at Amsterdam, and were destined for places in Germany. The ship proceeded to Swansea to load more cargo, and was kept there by her owners. After war had broken out between Great Britain and Germany these parcels were seized by the Customs officer at Swansea, and ordered to be discharged, and were condemned as prize. The shipowners claimed to receive out of the prize full freight and the expenses of discharging these parcels and of shifting the ship to a discharging berth for the purpose:—*Held*, that the claim to some freight and to the other expenses should be allowed, and a reference was ordered to ascertain the amount on the principles above stated.

THE JUNO . . . . . 151

— *Enemy Cargo Loaded before War—Seizure—Shipowners' Claims—Extra Freight—Expenses Due to Diversion and Detention—Extra Expenses of Discharge.*

British shipowners are not entitled to any sum for inconvenience or delay to the ship due to her being diverted or detained for the discharge of enemy cargo on board her, nor for the estimated extra cost of discharge as compared with the cost which would have been incurred at the port of destination.

The principles laid down in *THE JUNO* (*ante*, p. 151) further explained.

THE TREDEGAR HALL . . . . . 492

*Cargo—Seizure as Prize—Release—Freight—Action for Freight in King's Bench Division—Subsequent Motion in Prize Court—Jurisdiction—Effect—Plea of Res Judicata—Estoppel.*

A cargo of cotton, wheat, and phosphate rock, laden in a British vessel and consigned to Hamburg, was seized as prize. Before the condemnation suit in prize was tried the Procurator-General ascertained that the phosphate rock, which had been discharged and warehoused at Runcorn, was owned by the consignors, a neutral company, and this portion of the cargo was released. Under the charterparty the shipowners had a lien for freight, and to get possession of their phosphate the cargo owners, under protest, deposited 1,680*l.* with the wharfingers in accordance with the provisions of the Merchant Shipping Act, 1894.

The shipowners brought an action in the King's Bench Division, claiming a declaration that they were entitled to the 1,680*l.* or to a sum *pro rata itineris*. ROWLATT, J., held that the voyage not having been completed, the shipowners were not entitled to full freight, and that, there being no agreement to accept delivery of the phosphate rock at Runcorn in discharge of the obligation to deliver at Hamburg, they were not entitled to freight *pro rata itineris* (*Law Journal*, vol. 50, p. 241).

Thereupon the shipowners moved in the Prize Court for a declaration that they were entitled to a sum in lieu of freight to be assessed by the Registrar. The cargo owners contended that the matter was *res judicata*.

*Held*, that, as the claim arose out of a seizure in prize, the rights of the claimants must be determined in accordance with the principles of prize; that the matter was not *res judicata*,

as the action in the King's Bench Division was upon a contract, and was decided according to common law principles, and not according to the equitable principles by which, in the Prize Court, a sum in lien of the full freight can be given; and that the shipowners were entitled to an order for a reference to the Registrar to assess the amount, if any, which should be allowed them in respect of freight for the carriage of the cargo to Runcorn.

THE ST. HELENA . . . . . 618

*Enemy Cargo—Freight—Voluntary Payments—Bona Fide Payments by Holders of Bills of Lading—Reimbursement.*

A voluntary payment of freight by persons for their own purposes in respect of cargo condemned as prize will not entitle them to claim reimbursement from the captors; but when freight has been honestly paid in respect of condemned cargoes, which would have had to bear the burden of the freight if unpaid, the Court may order repayment if, in the circumstances, it is just and equitable.

British bankers, being the holders of bills of lading on cargo carried in a British ship and consigned to a neutral port, innocently paid a portion of the freight in ignorance of the fact that the cargo had already been seized as prize:—*Held*, that the sum so paid should be reimbursed to the bankers out of the proceeds of sale of the condemned cargo.

THE MANNINGTRY . . . . . 497

*Enemy Ship—Freight on Released Cargo—Captor's Rights.*

A captor is not entitled to freight from the owners of cargo brought before the Prize Court and released to them, unless the cargo has been carried to its port of destination.

THE ROLAND . . . . . 188

*Jurisdiction—Release of Cargo Seized as Prize—Claim for Freight by Shipowner in Prize Court—Cargo Owner's Claim in King's Bench Division.*

The jurisdiction to determine questions as to the right of the shipowner to freight on cargo which has been seized as prize is in the Prize Court and not in a Court of common law, although the cargo has been released without being brought before the Court for adjudication.

THE CORSICAN PRINCE . . . . . 178

**FUGITIVES, REMOVAL OF.**—See REFUGEES.

**"FURTHER PROOF."**

*Presumption as to Cargo on Enemy Ship—Burden of Proof—"Further Proof"* . . . . . 188

*Prize Court Rules, EBFB—"Further Proof"—Claim of Beneficial Owners* . . . . . 233



**GENERAL AVERAGE.**

*Enemy Cargo—Capture—General Average Contribution.*

Where a claim by the ship against the cargo for a general average contribution exists before the cargo is captured as prize the captors take *cum onere* of the cargo's contribution to the general average loss.

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**HOSPITAL SHIP.**

*Enemy Hospital Ship—Seizure as Prize—Suspicious Movements—Signalling Lights—Destruction of Ship's Papers—Hague Conference, 1907, Convention X.*

An enemy vessel, certified by the German Government as an auxiliary hospital ship, and adapted (though inadequately) as such, was encountered in the North Sea, near the Haaks lightship, by British warships. She was taken into port to be searched, and was afterwards seized as prize. She had on board 1,220 Verey's lights, and rockets and flares suitable for signalling, of which no satisfactory account was given by her. When about to be boarded by an officer from one of the warships, a number of books and documents were thrown overboard, and subsequently others were burnt; and she had shortly before sent a wireless message in code to the German signalling station at Norddeich. She had made two unexplained voyages to Heligoland. On the only occasion on which she went out to render assistance after a German naval disaster, forty-eight hours elapsed before she arrived on the scene, the distance to be covered being sixty miles; and during the ten weeks that the war had lasted no sick, wounded, or shipwrecked person had been received on board. There was evidence that she had increased speed to evade search by a British submarine. According to her log, her full speed was at least two knots

more than was sworn to by her witnesses, and there were other matters not satisfactorily explained:—*Held*, that the vessel was not adapted and used for the whole purpose of affording aid to the wounded, sick, and shipwrecked; that she was adapted and used as a signalling ship for military purposes; that therefore she had forfeited the protection afforded to hospital ships by Convention X. of the Hague Conference, 1907; and that she must be condemned as lawful prize.

The serious view taken by Prize Courts of the destruction of ship's papers, and the doctrines laid down with reference thereto, are specially applicable to vessels claiming to be hospital ships, whose papers should be perfectly innocent; and if the ship's papers are not preserved, the inference is strong that if produced they would afford evidence of guilty practices.

THE OPHELIA . . . . . 210

### IGNORANCE OF HOSTILITIES.

*Enemy Ship—Ignorance of Hostilities—Arrival off Belligerent Port—Order to Proceed to Examination Anchorage—Capture* . 339

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### INSURANCE.

*Cargo—Enemy Goods—Neutral Ship—War Risk Insurance* . 519

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### JURISDICTION.

*Prize Jurisdiction—Cargo of Oil—Discharge into Tanks—Droits of Admiralty—Seizure "on land" or in "port"—Enemy National Character—German Company—International Combine—Notice of Detention—Ambiguity—Lawful Seizure.*

A cargo of oil was shipped on a British steamship at Port Arthur, Texas, for delivery at Hamburg. The oil was the property of a German incorporated company, which was an international combine, and most of its shares were held by incorporated companies of nations which were not enemies. During the voyage and after the outbreak of war with Germany, the vessel, owing to a request of the Admiralty, was diverted eventually to London and was moored at a wharf. The oil was discharged into tanks belonging to the wharfingers, one hundred to one hundred and fifty yards away from the wharf, by means of the ship's pumps and connecting pipes. Notice by an officer of Customs that the whole cargo was "placed under detention," was delivered on board when most of the oil had been discharged, but the remaining oil was afterwards discharged into the tanks:—*Held*, first, that the whole cargo of oil should be condemned as droits of Admiralty, and that the case was within the jurisdiction of the Prize Court; that the oil in the tanks was seizable even if it was strictly "on land" and not in "port," but that the tanks were oil warehouses and the oil therein was seized in "port"; secondly, that the German company, being incorporated and resident in Germany, was of

an enemy national character, notwithstanding its international position; and thirdly, that the Customs notice that the cargo was placed under detention was a lawful seizure of the oil as droits of Admiralty, and the contention that the notice was too ambiguous was disallowed.

THE ROUMANIAN . . . . . 75

— *Enemy's Goods in British Ship—Cargo of Oil—Discharge into Tanks—Seizure.*

Enemy goods on British ships, whether on board at the commencement of the hostilities or loaded during the hostilities, are liable to be seized as prize either on the high seas or in the ports or harbours of the realm.

A cargo of oil belonging to an enemy on a British ship, brought into a British port and pumped for safe custody into tanks on shore may be lawfully seized as prize in such tanks, and the delivery of a letter from the Customs House authorities, addressed to the master, stating that the cargo is placed under detention, is an effectual seizure.

THE OOSTER EEMS [1784] (1 C. Rob. 284n.; 1 Eng. P.C. 136n.) disapproved and not followed.

Judgment of the PRIZE COURT (*ante*, p. 75) affirmed.

THE ROUMANIAN (Privy Council) . . . . . 536

— *Freight—Release of Cargo Seized as Prize—Action for Freight in King's Bench Division—Subsequent Motion in Prize Court—Plea of Res Judicata* . . . . . 618

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## JUS DISPONENDI.—See CARGO—PASSING OF PROPERTY.

## LAND, SEIZURE ON.

*Cargo of Oil—Discharge into Tanks—Seizure—Jurisdiction* . 75

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**PARCEL POST.**

*Parcel Post—Enemy Goods—Shipped on Enemy Vessel—Hague Conference, 1907, Convention XI. art. 3—Extent of Exemption.*

Article 1 of Convention XI. of the Hague Conference, 1907, which provides immunity from capture to postal correspondence found in an enemy ship, does not apply to parcels sent by parcel post.

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**PARIS, DECLARATION OF, 1856.**

*Enemy Goods in British Ship—Liability to Seizure . . . . . 137, 536*

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**PARTICULARS.—See PRACTICE.****PARTNERSHIP.**

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*Enemy Cargo—Partnership Property—British Partners in Enemy Firm—Severance of Connection with Enemy Firm.*

Where property belonging to a firm whose house of trade is in an enemy country has been seized as prize, the shares attributable to British partners or quasi-partners domiciled in England, will be condemned unless they prove that they took immediate steps on the outbreak of war to sever their connection with the enemy firm.

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*Partnership—Enemy Firm—Dissolution by War—Shares of British Partners—Shares of Naturalised Enemy Subject.*

A partnership between British and German subjects, framed according to English law, carried on business in China as a German firm under the control of the German consular authorities. The British partners severed all connection with their German partners within a reasonable time after the outbreak of war:—*Held*, that the partnership was dissolved by the outbreak of war, and the interest of the British partners in goods captured at sea and seized as prize should be released to them proportionately to their shares in the partnership, the goods being the property of the individual members, and not the property of the firm.

THE DERFFLINGER (No. 3) (Egypt) . . . . . 643

**PASS.**

*Enemy Ship—Discharging in Belligerent Port—Offer of Safe Conduct Pass—Form of Pass—Refusal to Leave—Detention . . . . . 242*

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## PLEADINGS.—See PRACTICE.

## PLEDGEES.

*Enemy Cargo—Claim of Pledgees—Accrual of Right to Sell.*

The pledgees of bills of lading of enemy cargo, which has been properly captured, have no claim which is recognised in the Prize Court; and the fact that the right to sell has accrued to the pledgees does not make the pledgees into owners.

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— *Right of Pledgees—Power of Crown to Exercise Bounty—Civil List Acts (1 Edw. 7. c. 4; 1 Geo. 5. c. 28).*

Where an enemy cargo has been properly taken as prize and condemned in the Prize Court, holders of the bills of lading, as pledgees, have no claim which the Court will recognise, and their position is not affected by the cargo being shipped in a British ship. But the power of the Crown to exercise bounty by way of redress of hardship still exists, and is not affected by the Civil List Acts (1 Edw. 7. c. 4, and 1 Geo. 5. c. 28).

Judgment of the PRIZE COURT (*ante*, p. 163) affirmed.

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See also PLEDGORS.

## PLEDGORS.

<i>Cargo—Enemy Pledgors—Default—Contracts of Sale Entered into by Pledgees—Pledgors' Loss of Right to Redeem—Enemy Character of Goods Changed</i> . . . . .	288
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*Enemy Cargo—Pledge to Neutral Bankers—Documents of Title Held by British Agents—Effect of Outbreak of War—Right of Pledgors to Redeem.*

The enemy owners of goods seized as prize, who have pledged them to neutral bankers before war, do not lose their right to

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redeem the goods by reason of the outbreak of war, although the documents of title to the goods may be held by British agents of the bankers, who are prohibited from commercial intercourse with the pledgors; and the bankers are merely in the position of pledgees whose claims cannot be recognised in the Prize Court—*THE ODESSA* (*ante*, p. 163).

*THE EUMAEUS* . . . . . 605

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*Cargo—Seizure “on land” or “in port”* . . . . . 75

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— *Enemy Vessel—Legal Evidence of Capture—Other Evidence—Prize Court Rules, 1914, Order XXV. rules 1, 2 (e)* . 29

— *Particulars and Pleadings—Onus of Proof.*

Pleadings or particulars of the grounds on which the Crown alleges that property, seized as prize, is confiscable will not be allowed except in extremely special circumstances. The onus is on claimants, whose property has been seized as prize, to file their claims and prove that the property is not confiscable.

*THE ANTARES* . . . . . 261

— *Power of Court to Review Decree—Rehearing.*

The Prize Court has power to review its decrees and to order a rehearing, but the power should be exercised with great caution.

*THE ORCOMA* . . . . . 402

*Presumption as to Cargo on Enemy Ship—Onus of Proof.*

According to prize law goods on an enemy vessel consigned to an enemy port are *prima facie* enemy goods, and the onus is on claimants who allege that the goods belong to them, as neutrals, to satisfy the Court with clear evidence.

*THE ROLAND* . . . . . 188

## PRE-EMPTION.—See REQUISITION.

**PRESERVATION IN SPECIE.**

*Neutral Cargo—Requisition by Crown—Preservation in Specie* . 309

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*Enemy Vessel—Legal Evidence of Capture—Other Evidence—Prize Court Rules, 1914, Order XXV. rules 1, 2 (e)* . . . 29

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*Neutral Cargo—Contraband—Requisition—Prize Court Rules, 1914, Order I. rule 2—Order XXIX, rules 1 and 3* . . . 261

— *Contraband—Requisition—Prize Court Rules, 1914, Order XXIX.—Order in Council of April 29, 1915—Validity* . 309

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*Neutral Vessel—Capture by Enemy—Recapture—Salvage to Recaptors* . . . . . 371

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*Enemy Ship—Removal of Fugitives from Enemy Base—Housing of Refugees—Philanthropic Mission* . . . . . 515

**REGISTRATION, CONSULAR.**

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*Enemy Yacht—Seizure—Claims in Respect of Repairs—Allowance as Act of Grace* . . . . . 573

**REQUISITION.**

*Neutral Cargo—Contraband—Requisition by Crown—Prize Court Rules, 1914, Order I. rule 2—Order XXIX. rules 1 and 3.*

After the outbreak of war certain copper shipped by an American company on a Norwegian vessel and consigned to Sweden, was bought afloat by a Swedish firm. The contract of sale guaranteed that the copper was for consumption in Norway and/or Sweden. After the vessel sailed, but before she reached her destination, copper, which had been on the conditional contraband list, was placed by Great Britain on the list of goods absolutely contraband. The vessel was stopped at sea and taken into a British port, and a writ in prize was issued



by which it was claimed that the copper belonged to enemies of the Crown, or, alternatively, was contraband, and was liable to confiscation.

Before the suit for condemnation had been heard an order *ex parte* was made by the Registrar, on the application of the Crown, for the release of the copper to the Lords of the Admiralty. The order purported to be made under Order XXIX. of the Prize Court Rules, 1914, rule 1 of which provided that if it were made to appear to the Judge that the Lords of the Admiralty desired to requisition a ship not yet finally condemned, and there was no reason to believe that the ship was entitled to be released, he should order that the ship should be appraised, and that upon payment into Court on behalf of the Crown of her appraised value she should be released and delivered to the Lords of the Admiralty. "Provided that no order shall be made by the Judge under this rule in respect of a ship which he considers there is good reason to believe to be neutral property." Rule 3 provided that if the ship was required forthwith she could be released without appraisement. By Order I. rule 2 it is provided that, unless the contrary intention appears, the provisions of the rules relative to ships shall extend and apply, *mutatis mutandis*, to goods.

On a motion to discharge the order of the Registrar,—*Held*, that Order XXIX. applied to goods; that rule 3 was subject to the provisions of rule 1; and that there was sufficient doubt whether the goods were entitled to be released to satisfy the provision in the first part of rule 1; but, there being good reason to believe the goods to be neutral property, that the order must be discharged.

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— *Contraband—Requisition by Crown—Right of Angary—Preservation in Specie—Order in Council of April 29, 1915—Order XXIX. of Prize Court Rules—Validity.*

The provisions of Order XXIX. rule 1 of the Prize Court Rules, authorised by an Order in Council of April 29, 1915, whereby a ship [or goods] which the Crown desires to requisition, and in respect of which no final decree of condemnation has been made, after appraisement, and upon an undertaking to pay the appraised value into Court, can be ordered by the Judge to be released and delivered to the Crown, do not violate the law of nations by reason of the fact that they are applicable to neutral ships and goods, and the Prize Court has the jurisdiction and the duty to give effect to them.

Claimants to property captured or seized as prize cannot demand by any rule of international law that the property shall be preserved in specie until the final decree determines whether it is to be released or condemned.

A neutral vessel, laden with a cargo of copper owned by neutrals and consigned to a neutral port, was captured by a British warship and brought into port as prize on the ground that the copper, a commodity placed by Great Britain on the absolute contraband list, had an ultimate enemy destination; and a writ in prize was subsequently issued claiming the condemnation of both ship and cargo. Before the hearing of the condemnation suit, the Procurator-General took out a summons for an order

that part of the copper should be released to the Crown in accordance with the terms of the above Order. PAGE  
 Ordered that the copper, after appraisement and an undertaking to pay the appraised value into Court in accordance with rule 5 of the Order, should be delivered up to the Crown as prayed by the summons.

THE ZAMORA . . . . . 309

**RESIDENCE.**—See DOMICILE

## **RES JUDICATA.**

*Cargo—Seizure as Prize—Release—Freight—Action for Freight in King's Bench Division—Subsequent Motion in Prize Court—Plea of Res Judicata . . . . .* 618

## **RESTORATION AFTER WAR.**

*Enemy Ship—Seizure in Port—Days of Grace—Sixth Hague Convention, art. 2—Form of Order—Detention—Restoration after War . . . . .* 122  
 — *Ignorance of Hostilities—Boarding at Sea—Permission to Continue Voyage—Subsequent Seizure in Belligerent Port—Detention—Restoration after War . . . . .* 130

**SAFE CONDUCT.**—See PASS.

## **ST. LUCIA.**

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## **SALE BEFORE WAR.**

*Enemy Ships — Sale before War — Enemy Flag — Invalid Transfer . . . . .* 16  
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**SALE BY PLEDGEEES.**—See PLEDGEEES.

## **SALE—CONTRACTS OF—**

### **C.I.F. AND F.O.B.**

### **SPECIAL CONDITIONS OF.**

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**SEA, CAPTURE AT.**—See ENEMY SHIP.

## **SELLING AGENTS.**

*Cargo—Passing of Property—Bills of Lading Indorsed to "selling agents"—Payment of Drafts Refused—Intention to Pass Property—Effect . . . . .* 623

**SHAREHOLDERS.**

*Enemy Vessel—Shareholders—Bounty of Crown* . . . . . 38

**SHIPOWNER'S RIGHT TO FREIGHT.—See FREIGHT.****SIGNALLING APPARATUS, SUBMARINE.**

*Enemy Ship—Submarine Signalling Apparatus—Lease to Shipowners—"Neutral goods"* . . . . . 13

**SIGNALLING LIGHTS.**

*Enemy Hospital Ship—Seizure as Prize—Suspicious Movements—Rockets and Flares—Signalling Lights* . . . . . 211

**STRAITS SETTLEMENTS.**

*Case in Prize Court of* . . . . . 371

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*Seizure in Suez Canal Port—Status of Canal—Suez Canal Convention, 1888—Décision of S.E. the Regent of August 5, 1914* . . . . . 102

**TRADING WITH THE ENEMY.**

*Cargo—Allied Ship—Trading with the Enemy—Claim for Freight Disallowed* . . . . . 579

— "*Documents against acceptance*"—*Enemy Consignee—Qualified Acceptance by British Firm—Trading with the Enemy* . . . . . 640

— *Enemy Consignor—British Consignee—Conditions of Sale—"Documents against acceptance"—Bill of Exchange Accepted after Outbreak of War—Trading with the Enemy—Transaction Void—Public Policy.*

Before the outbreak of war goods were shipped on a German vessel by a German consignor, to a British firm in Ceylon to the order of the shippers, "documents against acceptance," and a bill of exchange was drawn by the sellers on the buyers which was discounted with a bank. After the outbreak of hostilities the British consignees accepted the bill and received the documents from the bank:—*Held*, that the acceptance of the bill involved a trading with the enemy, and was therefore an illegal transaction, and that consequently the property in the goods remained in the enemy consignors.

THE BARENFELS (No. 2) (Egypt) . . . . . 395

*Trading with the Enemy—Commercial Intercourse between Subjects of an Allied and an Enemy State—Obligations of Allied Subjects—Bona Fides—Ally's Cargo Condemned.*

In May, 1914, a French company contracted to sell to a German firm at Frankfurt a quantity of silver lead f.o.b. Ergasteria, in Greece. In pursuance of the contract the French company chartered a steamer for a voyage to Antwerp and Newcastle to carry the lead to the purchasers from the German firm. Before

the loading, which began on July 29, was finished, war broke out between Great Britain and her allies and Germany. On August 11 the vessel sailed. The French company then entered into negotiations with the London office of the German firm as regards the delivery of the lead, but on August 23 that office was closed by order of the Home Secretary, the negotiations fell through, and the French company diverted the vessel to Swansea, where the cargo, the property in which admittedly remained in the French company, was seized as prize:—*Held*, that the facts shewed that after war broke out the French company, although acting in good faith, had had commercial intercourse with the German firm which amounted to a trading with the enemy; and, the subjects of an allied State being under the same obligations to Great Britain as regards intercourse with the enemy as British subjects, that the silver lead must be condemned.

THE PANARIELLOS . . . . . 195

### TRADING WITH THE ENEMY PROCLAMATION.

*Cargo—Seizure—Enemy Company—Branch Office in Allied Territory—Claim by Branch Office—Trading with Enemy Proclamation (No. 2) of September 9, 1914 . . . . .* 606

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*Enemy Ships—Sale whilst at Sea—Invalid Transfer . . . . .* 16  
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*Neutral Vessel—Contraband—Belligerent Charterers—Unneutral Service—Owner's Ignorance—Declaration of London, 1909, art. 40 . . . . .* 226

— *Contraband Cargo for British Government—Capture by the Enemy—Employment as Collier—Unneutral Service—Absence of Mens Rea—Recapture by British—Restoration—Salvage to Recaptors—Naval Prize Act, 1864, s. 40.*

After the outbreak of war between Great Britain and Germany, a Greek vessel, bound to Karachi with a cargo of coal for the North-Western State Railway of India, was captured as prize by a German cruiser on the ground that the cargo was contraband destined for the British Government. The captain and crew were given the option of discharging their duties on their own vessel, for which they were promised payment, or of going on board the cruiser. They elected to remain, and subsequently were paid, but the Greek master took no further part in the control of his ship. A German officer with an armed escort was put on board, and for some days the vessel was navigated by him in the wake of the cruiser and a German collier accompanying her. The cruiser coaled from the cargo in the Greek vessel, and then steamed away accompanied by the collier. The Greek vessel was then navigated towards the coast of Sumatra by the German officer in charge of her, the Greek master on three occasions being locked in his cabin at night time, and she remained alone for nearly three weeks, when the collier returned, and was in the act of taking more coal from her, when a British

cruiser came up and captured both vessels. The collier was sunk together with her cargo, and the Greek vessel was brought in as prize.

The Crown claimed condemnation of the vessel on the ground that she had passed into the service of the enemy, and of the cargo on the ground that it was contraband about to be delivered to the enemy:—

*Held*, first, that in the absence of *mens rea* on the part of the owners, charterers, or master, the mere fact that a neutral vessel is rendering unneutral service is insufficient to condemn her; secondly, that under the circumstances the supplying of coal to the enemy was not to be regarded as “assistance hostile” or unneutral service, as the master was not a free agent, and there was no contractual relationship—which the word “service” implies—between the owners, charterers, or master and the enemy; thirdly, that the recapture operated in favour of the original owners, and the vessel must be restored; and fourthly, that the proceeds of sale of the cargo must be paid out to the cargo owners less one-eighth to be deducted as salvage to the recaptors in accordance with section 40 of the Naval Prize Act, 1864.

THE PONTOPOROS (Straits Settlements) . . . . . 371

— *Unneutral Service—Coal for Belligerent Cruiser—Declaration of London, 1909, art. 46.*

Before a state of war existed between Great Britain and Germany a neutral vessel left a neutral port, ostensibly bound for another neutral port with a cargo of coal. Unknown to her owners her destination was changed, and she was sent by the supercargo (an officer in the German Naval Reserve who was put on board by German sub-charterers) to coal German war-ships. While waiting for this purpose, some weeks after the outbreak of war she was captured by a British cruiser:—*Held*, that the vessel had been guilty of unneutral service, as she was “under the orders or control of an agent placed on board by the enemy Government” and was “in the exclusive employment of the enemy Government” within the meaning of article 46 of the Declaration of London, 1909, and that she must be condemned.

THE THOR (St. Lucia) . . . . . 229

— *Unneutral Service—Removal of Non-combatants from Belligerent Port—Vessel in Control of Enemy Government—Transmission of Intelligence to Enemy—Suspicious Movements—Declaration of London, 1909, arts. 45 (1), 46 (2) (3).*

On July 28, 1914, an American-owned vessel arrived at Tsingtao, and on August 5 the officers, three of whom were British, were replaced by Germans, as no officers of a neutral Power could be obtained, and the German authorities would not allow British officers to navigate the vessel through the channel leading to Tsingtao, which was mined. The same day the vessel left for Chefoo with no cargo and a few Chinese coolies as passengers. On August 7 she returned from Chefoo, and left on August 9 for Shanghai. She carried no cargo on either voyage. She remained at Shanghai until August 20, when she again left for Tsingtao without cargo. In the course of this voyage she was

stopped by a British warship, and taken to Wei-hai Wei as prize. PAGE

The Crown claimed condemnation of the vessel on the following grounds: First, that, with the object of removing refugees, she was bound to Tsingtao, an enemy port which was likely to be, and shortly afterwards was, blockaded; secondly, that she was under the orders and control of the enemy Government; and thirdly, that her voyages between Chefoo and Tsingtao, which took her close to Wei-hai Wei, the naval station used by the British China squadron, were undertaken to gather and convey information to the enemy as to the movements of H.M. ships:—*Held*, first, that there was nothing inconsistent with the duties of a neutral in carrying ordinary passengers to or from a belligerent port; secondly, that on the evidence the German master was acting in the interest of the neutral owner, who had not surrendered the control of his vessel to the belligerent Government; thirdly, that some positive breach of neutrality must be proved before a neutral vessel can be condemned, and none had been established; and therefore that, although the movements of the vessel were suspicious, she must be released.

THE HANAMETAL (Hong Kong) . . . . . 347

## WAR, IMMINENCE OF.

*Cargo—Sale in Transitu—Imminence of War—Outbreak of War—Sale not in Contemplation of War—Validity* . . . . . 332

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*Enemy Yacht—Outbreak of War—Detention in British Port—Days of Grace—Condemnation* . . . . . 573









